Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,660

PAUL E. KERN, etc.,

Appellant,

—v.—

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,

Appellees.

Before:

SIMONS, MARTIN and MILLER,
Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal be and it is dismissed; and the judgment of the District Court confirming the plan of reorganization is affirmed.

Approved for entry:

/s/ JOHN D. MARTIN
U. S. Circuit Judge

Filed
January 15, 1959

FILE COPY

FILED
MAR 14 1959
JAMES R. BROWNING, Clerk

No. 774

In The

Supreme Court of the United States

OCTOBER TERM, 1958

In the Matter of
INLAND GAS CORPORATION,
Debtor,

In the Matter of
KENTUCKY FUEL GAS
CORPORATION,
Debtor,

In the Matter of
AMERICAN FUEL & POWER
COMPANY, et al.
Debtors,

In Bankruptcy

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Charleston, West Virginia

March 14, 1959

NO. 774

PETITION FOR CERTIORARI OF ALLEN COMMITTEE

Errata:

Page 1, last line after the words "on motion", add "appeals from".

Page 14, 3rd line from bottom in second paragraph the word "reject" should read "rejected".

Page 16, 6th line from the bottom the word "from" should read "for".

Page 25, in the heading in the middle of the page the word "Contract" should read "Control".

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RECORD

The record on this petition consists of copies of the Appendices filed with the Clerk as a part of the Writ of Certiorari sought by the Vanston Committee to the same order of the Court of Appeals for the Sixth Circuit sought to be reviewed here.

RECORD REFERENCES

THE DEBTOR CORPORATIONS

American, Inland and Kentucky: American Fuel & Power Company (including minor subsidiaries Inland Gas Distributing Company and Carbreath Gas Company), Inland Gas Corporation and Kentucky Fuel Gas Corporation, respectively, the debtors.

SECURITIES

American Notes: 5 year, 7% Convertible Gold Notes of American secured by pledges of 72.6% of the Common Stock of Inland and Stock of other subsidiaries.

Inland Bonds and Debentures: First Mortgage, 6½% Bonds and Second Mortgage of 7% Debentures of Inland.

Kentucky Bonds and Debentures: First Mortgage, 6½% Bonds and 10 years, 6½% Debentures of Kentucky.

OTHER PARTIES

Allen Committee: These petitioners, representing common stockholders of American other than Columbia.

Columbia: Columbia Gas System, Inc., formerly, before change of name, Columbia Gas & Electric Corporation.

SEC: United States Securities & Exchange Commission, a statutory party.

Trustees: Clinton M. Harbison, Trustee in Bankruptcy of American, and Ben Williamson, Jr., Trustee of Inland and Kentucky, as the context may require.

SHORT REFERENCES TO CASES

1941 Appeals: In re. American Fuel & Power Co., 6 Cir., 122 F. 2d 223.

1945 Appeals: Columbia Gas & Electric Corp. v. *United States*, 6 Cir., 151 F. 2d 461.

1951 Appeals: In re. Inland Gas Corp., 6 Cir., 187 F. 2d 813.

1954 Appeals: In re. Inland Gas Corp., 6 Cir., 211 F. 2d 381.

1957 Appeals: In re. Inland Gas Corp., 6 Cir., 241 F. 2d 374.

1958 Appeals: The Appeals sought to be reviewed here. Opinion is not yet reported but is printed in Appendix, p. 19.

MISCELLANEOUS

Act: The Bankruptcy Act.

Plan: The Plan of Reorganization for the debtors filed below by the Trustees on February 25, 1958 and confirmed by the District Court on May 28, 1958. (Filed as Exhibit R. with Harbeson objection May 13, 1958 order.)

Other original documents will be referred to by title or date of filing.

Emphasis has been supplied in quotations throughout this brief unless otherwise noted.

No._____

In The

Supreme Court of the United States

OCTOBER TERM, 1958.

In the Matter of INLAND GAS CORPORATION, *Debtor*,	In Bankruptcy
In the Matter of KENTUCKY FUEL GAS CORPORATION, *Debtor*,	
In the Matter of AMERICAN FUEL & POWER COMPANY, et al. *Debtors*,	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Elmo E. Allen and George Greenwald, surviving members of a committee of stockholders of American Fuel & Power Company and Edward D. Spilman, a stockholder of American Fuel & Power Company, pray that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled proceedings on January 15, 1959, dismissing on motion a District

Court order confirming[1] a single plan of reorganization of American Fuel and Power Company and its subsidiaries.

OPINION BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals dated January 15, 1959, not yet published, is printed at p. 19 of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on January 15, 1959. By order entered February 12, 1959, a stay was granted contingent upon filing this Petition within thirty days from that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

I.

Columbia, a huge gas utility, in the course of a conspiracy to restrain and monopolize commerce in natural gas in violation of the Antitrust Laws, purchased bonds, debentures and notes of three debtors interrelated through stockholdings, who were little competitors, for the purpose of acquiring the property and business of the debtors by foreclosure; but foreclosure being impossible, as a part of the same illegal conduct Columbia then acquired the majority of the stock of the debtors and through stock control forced the debtors into receiverships from which this bankruptcy proceeding has developed, in order to acquire

[1] Although many petitions for certiorari have been filed here during the administration of the estates of these debtors, petitions filed now for the first time seek review of a *final* order confirming a plan of reorganization.

the debtors' property and business. A confirmed plan of reorganization of all debtors provides for the payment of all of the creditors except Columbia in cash provided by earnings during bankruptcy and a bank loan, and transfer of the debtors' assets and business to a reorganized company, which will issue all of its stock to Columbia in recognition of Columbia's illegally acquired claims. The questions presented are:

1. Whether the claims of Columbia were properly allowed?

2. Whether the stock interest of innocent minority stockholders of the debtors should be classified as superior to Columbia's claims?

3. Whether the plan of reorganization is fair and equitable?

II.

American and Kentucky having large debts and few assets hold substantially all of the stock of Inland which has substantial assets. All creditors of Inland have been paid, leaving Inland with surplus assets in excess of its liabilities. The plan of reorganization allowed the claims of creditors of American and Kentucky as "quasi creditor" claims against Inland superior to the claims of Inland's stockholders, American and Kentucky. The courts below found that American and Kentucky, as controlling stockholders of Inland, have not overreached their subsidiary and that before bankruptcy the corporate identities of each debtor was maintained. No equities appear justifying disregard of the corporate entities of the debtors. The questions presented are.[2]

1. Whether the courts below properly classified quasi creditor claims of American and Kentucky against Inland as superior to the claims of Inland stockholders?

2. Whether the courts below properly found Inland to be insolvent?

[2]The questions under this heading will not arise unless review of the questions under I is granted, since if the Columbia's status as a creditor of Inland is maintained, no Inland assets will be left for its stockholders.

STATUTES INVOLVED

The statutes involved are Sec. 2, Bankruptcy Act, 66 Stat. 420, 11 U. S. C. Chap. 2, Sec. 11(2); Sec. 57(k), Bankruptcy Act, 52 Stat. 866, 11 U. S. C. Chap. 6, Sec. 93(k); Sec. 221(2), Bankruptcy Act, 52 Stat. 897, 11 U. S. C. 621(2). These are are printed in the Appendix p. 29.

STATEMENT[3]

A single Chapter X plan of reorganization of the debtors, American Fuel & Power Company (and small subsidiaries), Inland Gas Corporation and Kentucky Fuel Gas Corporation, was confirmed below. The jurisdiction of the District Court was invoked because the cases arise under the Bankruptcy Act.

The debtors: American is a holding company controlling Inland and Kentucky through stock ownership. Kentucky and Inland before bankruptcy were operating companies engaged in the production and sale of natural gas in Kentucky, Ohio and West Virginia. Substantially all of the assets of Kentucky were sold to Inland during the course of these proceedings, leaving Kentucky now virtually without property. Inland owns valuable gas producing properties and distribution facilities and has valuable contracts for purchasing gas at wholesale and resale at retail. The assets of all the debtors are valued under the Plan at $10,538,800.

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[3]The facts given in the following statement are taken largely from portion of the opinion of the Court of Appeals in *Columbia Gas & Electric Corporation* v. *United States*, 151 F. 2d 461 (1945) printed in the Appendix, p. 21.

The creditors: In 1928 and 1929 Inland, Kentucky and American sold very large issues of debt securities to the investing public. Inland's issues consisted of Bonds secured by a first mortgage on its properties and Debentures secured by a second mortgage. Kentucky sold bonds secured by a first mortgage and Sinking Fund Debentures. American's issue consisted of Notes secured by a pledge of the stock of its subsidiaries, including its holdings of Inland and Kentucky stock.

The present holders of these debt securities are the principal creditors participating in the Plan. Two broad classes are recognized in these proceedings (a) "public" investors who bought their securities for ordinary reasons of investment or profit; and (b) Columbia which bought large issues of these securities in the open market in the course of a conspiracy in restraint of trade as a step toward the illegal acquisition of the business and assets of the debtors.

Columbia's claims need comment. In 1930 Columbia was the dominant seller of gas in the area served by the debtors and in neighboring states. In that year it purchased on the open market at almost face value very large amounts of Inland and Kentucky Bonds and Debentures which Columbia knew were close to default in order to force foreclosure and to buy the debtor's property at forced sale. Before the expected default occurred, the controlling stockholders of American arranged for new financing by a syndicate to prevent default and to finance expansion which if successful would have enabled the debtors to meet their debt charges and compete vigorously with Columbia. The syndicate required the American stockholders to sur-

render control by issuing to it 76% of the American stock. In order to defeat the threat posed by the new financing, Columbia bought the syndicate's stock and other properties for some $3,000,000 and installed its nominees as officers and directors of American. These officers forced the debtors into equity receiverships which were followed by reorganizations under Section 77B and Chapter X of the Bankruptcy Act. Both courts below have emphatically and repeatedly held that the purchase by Columbia of the debt obligations and stock control of the debtors was made in the course of a conspiracy to monopolize trade and commerce in violation of the Antitrust Laws. Details of the conspiracy and the Court of Appeals' opinion of Columbia's conduct are found in its opinion on the 1945 Appeals, parts of which are copied at page 21 of the Appendix.

All publicly held debt issues of Inland have been paid during bankruptcy. The principal contending creditors are therefore the public holders of American Notes and Kentucky Bonds and Debentures on the one hand, and Columbia on the other.

The Stockholders: The stock of American (which as noted controls the other debtors) is owned 76% by Columbia and 24% by public stockholders represented by the Allen Committee. American owns 72.6% of the Inland stock and about 90% of the Kentucky stock. Kentucky in turn owns about 26% of the Inland stock. The remaining Inland stock, 1.4%, is owned by the investing public. The minority stockholders of American, represented by the Allen Committee, seek rejection of Columbia's claims since upon rejection, 72.6% of Inland's assets after payment of allowed claims would

normally flow to American. This, added to American's assets, would be sufficient to pay American's debts and leave substantial assets for American's stockholders.

The Plan following decisions of the Court of Appeals is based upon the following principles: (See Plan, pp. 3, 4, Exhibit R to American Trustee motion to dismiss appeal from Order Operating Plan dated May 13, 1958).

1. Columbia's claims against each of the debtors are subordinated to the claims of public creditors of each debtor. Columbia's claims against Inland are also subordinated to the claims of the holders of American Notes and Kentucky Bonds and Debentures (See par. 3 below).

2. The assets of each debtor are applied first to the claims of its public creditors.

3. The public holders of American Notes and Kentucky Bonds and Debentures are classified as "quasi creditors" of Inland whose claims to Inland's assets are superior to Columbia's subordinated claims against Inland and to the claims of Inland's stockholders guilty of no wrong. After the payment of Inland's public creditors, the Inland assets are applied to the payment of the American Notes (secured by a pledge of 72.6% of the Inland stock) as secured claims against Inland with interest to date of payment, and to the payment of Kentucky Bonds and Debentures (not secured by a pledge of Inland stock) as unsecured claims against Inland without interest since insolvency.

4. The Inland Trustee will obtain a bank loan under a commitment already made which will supply cash,

which, added to the cash and cash items held by the trustees, will be sufficient to pay off all public creditors of all the debtors allowed under the plan.

5. A reorganized company will acquire the physical assets and contracts of Inland and will issue to Columbia all its common stock of the par value equal to the remaining Inland assets. Under the Plan valuation this is $3,060,000 as of December 31, 1957. The face amount of the Inland Bonds held by Columbia is $1,571,054.40 as of December 31, 1957. The remainder is postbankruptcy interest.

6. No stockholder of Inland will participate *qua* stockholder, although the American and Kentucky creditors are recognized as "quasi creditors" of Inland because of the Inland stock held by American and Kentucky. (The Plan, particularly p. 3).

Six Court of Appeals Decisions Bearing Directly on Allowance of Columbia's Claims.[4] The 1941 Appeals rejected a compromise, approved below, of treble damage suits for Antitrust violations brought by the Inland Trustee against Columbia. Columbia's claims against and stock interest in all the debtors were ordered disallowed.

The 1945 Appeals affirmed findings of Columbia's violation of the Antitrust Laws but departed from the 1941 decision by subordinating Columbia's claims to the claims of public creditors of every class. Inland's assets then were not sufficient to pay its public creditors.

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[4]The style and citations in the cases which follow are found under "References", p. iv.

The 1951 Appeals reviewed a plan of reorganization approved below, which provided for participation of Columbia to the extent of the value of Inland's assets after payment of all publicly held claims against Inland. The Sixth Circuit, refusing to allow Columbia to participate reversed, reasoning that the creditors of American and Kentucky in purchasing debt securities had relied on a pledge of Inland stock and therefore were "quasi creditors" of Inland entitled to recovery from Inland assets after payment of Inland's public creditors in proportion to the American (72.6%) and Kentucky (26%) holdings of Inland stock.[5] Contrary to the position of SEC the public holders of 1.4% of Inland's stock were denied participation.

The 1954 Appeals sustained a plan of reorganization approved below which, eliminating Columbia, provided for participation of American and Kentucky public creditors as quasi creditors of Inland. Inland's assets had increased to the point that 72.6% of its surplus flowing to American would more than discharge American's public creditors. The "overage" was not allocated to American stockholders but to Kentucky creditors, an abandonment of the proportional allocation in the 1951 opinion.

The 1957 Appeals considered a new plan of reorganization made necessary by a large increase in Inland's assets and an offer to buy the debtors' properties for cash. The trustees prepared a plan under which

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[5]This reasoning subsequently broke down completely as applied to Kentucky creditors. In later proceedings it was shown that Kentucky bought the Inland stock after the bonds were sold. The bondholders could not have relied on Inland earnings to discharge the obligations when the bonds were issued. Later evidence also developed that Kentucky bonds were not secured by a pledge of Inland stock and the court so held. (See 141 F. 2d 374.)

American public creditors would be paid principal and interests from the proceeds of sale. The remaining cash was to be paid to Kentucky Bond and Debenture holders. This would have discharged the entire principal and made a large payment on interest. The District Court disapproved the plan and ordered the trustees to prepare a new plan allocating Inland's assets to the payment of (i) American Notes with full interest; (ii) the principal of Kentucky Bonds and Debentures; and (iii) the remainder to Columbia. The Court of Appeals affirmed the District Court's order. The Allen Committee petitioned the Court of Appeals to reconsider the 1945 opinion subordinating rather than rejecting Columbia's claims on the ground of changed circumstances consisting of a large increase in the value of Inland's assets. The Petition was dismissed. SEC unsuccessfully urged disallowance or subordination of Columbia's claims to public stockholders' interest.

The 1958 Appeals challenged the present Plan. The Allen Committee and SEC again urged that rights of innocent public stockholders of Inland and American should take precedence over Columbia's illegally acquired claims. All appeals were dismissed on motion.

REASONS FOR GRANTING THE WRIT

1. Allowance of Columbia's claims probably conflicts directly with the decision of this court in *Pepper* v. *Litton*, 308 U. S. 295. The basic principles of the *Pepper* case seem to be (a) a bankruptcy court is a court of equity and

> "* * *. By reason of the express provisions of § 2 (Bankruptcy Act) these equitable pow-

ers are to be exercised on the allowance of claims, a conclusion which is fortified by § 57(k)[6]" (308 U. S. p. 305);

(b) where a claimant in bankruptcy is the controlling stockholder of the debtor, as Columbia is here, allowance depends upon the utmost good faith in the dealings between the stockholder and the debtor (*id.*, p. 306); (c) where a claimant submits to the bankruptcy court a claim which is valid on its face, that court has power to look behind the claim and, valid or not, to determine whether it is one which equity will enforce (*id.*, p. 303); and (d) unless the claim meets strict standards of fairness and equity, it will be disallowed.

Further, if allowance of Columbia's claims does not conflict directly with the decision in *Pepper* v. *Litton*, it surely conflicts with the principles there announced and the principles settled by *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156. In *Vanston* this court, in the majority opinion, held that allowance of a claim (for interest on interest) even in the complete absence of any misconduct on the part of the claimants will be disallowed under general "equitable principles" (329 U. S., pp. 163, 165, 166) if the rights of other interested parties will be prejudiced. Here clearly equitable principles demand rejection of Columbia's claims. The rights of stockholders guilty of no wrong are wiped out by the Plan. *Cf. Sampsell* v. *Imperial Paper & Color Corporation*, 313 U. S. 215; *Taylor* v. *Standard Gas & Electric Company et al.* 306 U. S. 307.

The litigation below shows that subordination decreed on the 1945 Appeal, reversing the original dis-

[6]This statute copied Appendix, p. 29.

allowance in 1941, was brought about not because there was any equity in Columbia's claims requiring subordination rather than rejection, but because at the time the practical result was disallowance.

In the 1941 Appeals the Sixth Circuit scathingly denounced Columbia's treatment of the debtors, their creditors and their stockholders and concluded:

> "* * *. Under the facts in this record no principle of equity, morals or law requires the court to approve the present claims or stock interests of the Columbia and this court should not lend its aid to further a scheme abhorrent to all recognized rules of right and justice as the facts here show." (122 F. 2d p. 229).

The court ordered rejection of Columbia's claims and stock interests in all the debtors.

Departure from this forthright stand was made on the 1945 Appeals (by another panel) because the court apparently felt that *Hartford-Empire Co. v. United States*, 323 U. S. 386, a patent infringement case, suggested, if not required, subordination. The paragraph discussing *Hartford-Empire* began:

> "In our view, Columbia receives no support from the case of Hartford-Empire Co. v. United States * * *".

but concluded:

> "* * * It may be as suggested by the S.E.C. that, under the facts of the case, the distinction between subordination and rejection is purely academic, but submissiveness in principle to the doctrine of the Hartford-Empire case, perhaps requires an amendment to the decree, limiting

> the remedy of the petitioners to the subordination of the Columbia claims." (151 F. 2d, p. 470). (See parts of the opinion at Appendix, p. 21, Hartford-Empire discussion, p. 28).

On the 1951 Appeal, at a time when Inland's assets had increased, Chief Judge Simons wrote further on *Hartford-Empire:*

> "* * *. Mature consideration leads to the conclusion that the analogy between Columbia securities here and the patents involved in the Hartford-Empire case, supra, is not as close as it then appeared to us to be." but " * * * This is not to say that subordination is not a more appropriate remedy than rejection, in view of the principle applied in the Hartford-Empire case, *if by it a just result may be reached.*" (187 F. 2d, p. 815.) (See court's full discussion of this point, Appendix, p. 31.)

On this Appeal, in order to exclude Columbia without rejecting its claims, the court created the fiction that American and Kentucky public creditors are creditors of Inland.

The Sixth Circuit was not confronted again with the possibility of Columbia's participation until the 1957 Appeal. Then the Allen Committee, as noted above, by petition alleging changed economic conditions, prayed for return to the 1941 holding disallowing Columbia's claims. The petition was dismissed. The reason given by Chief Judge Simons is:

> "* * *. Undoubtedly, the petitions (sic), if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. * * *" (241 F. 2d, p. 381).

On the motions to dismiss the 1958 Appeals the court directed counsel not to argue "issues already litigated or relitigated,"[7] including the issue of Columbia's status as a subordinated creditor. Columbia's equities were not considered in the opinion.

SEC has repeatedly taken the position that Columbia should not profit from its wrongs while minority stockholders are left without remedy. Specifically, it unsuccessfully argued on the 1945 Appeal that stockholders owning 1.4% of the Inland stock should participate and on the 1957 and 1958 Appeals that Columbia's claims should be subordinated to the interest of the public stockholders or reject. (See Third Advisory Report filed below May 2, 1958, Exhibit K Harbeson motion to dismiss).

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2. An important question of bankruptcy administration involving the "absolute priority" rule is pointedly presented by the holding below that the Plan is fair and equitable although by it public creditors of American and Kentucky are classified as quasi creditors of Inland whose claims against Inland's assets are prior to the claims of Inland stockholders.[8]

It is established law that no plan of reorganization is fair and equitable which does not classify creditors'

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[7]The full contents of a letter from the Clerk of the Court of Appeals to counsel, dated November 26, 1958, is:

"In response to various inquiries from counsel concerning the extent of the hearing on December 15, I am directed to advise you that the hearing will be confined to the motions to dismiss. The court does not expect that any argument will be presented on issues already litigated or relitigated."

[8]As previously noted, this question will not arise unless Columbia's claims are rejected or subordinated to innocent stockholder interests.

claims and stockholders' interests in the order of "absolute priority" as arranged by the contracts between debtor, creditor and stockholder. *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106; *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510. While these cases emphasize the necessity that a plan fully compensate all creditors before stockholders can participate, reason and the cases recognize that a plan of reorganization must allow stockholders' interests after full compensation to creditors.

We recognize, of course, that the Plan would be fair and equitable if there were compelling equities requiring subordination of the rights of the Inland stockholders to the rights of creditors of American and Kentucky. The fact that American is the controlling stockholder of Inland and Kentucky suggests this possibility. *Cf. Taylor* v. *Standard Gas & Electric Company*, 306 U. S. 307. But no such equities exist here. Both courts below have repeatedly and affirmatively found a complete absence of domination or overreaching by American of its subsidiaries or any questionable conduct toward either of them. A charge of domination of Inland by American, made by the public Inland creditors who claimed priority over certain American claims against Inland, was rejected on the 1951 Appeal. The Sixth Circuit there wrote:

> "* * *. The court (below) found nothing in the record to justify any conclusion that Inland or its creditors were in any way injured or overreached by American Fuel, and we find none. * * *". (187 F. 2d, p. 818.) (See Appendix, p. 33 for the court's discussion of this point).

To the contrary, it is established that the entire proceeds of the sale of American's issue of $2,000,000 Gold Notes was used for the benefit of the subsidiaries.[9] Prior to bankruptcy American received no dividends from, and no repayments of loans to, Inland or any of its subsidiaries. American helped not injured Inland.

3. The course of these proceedings is believed to have so far departed from the usual and accepted principles of bankruptcy administration as to require the exercise of this court's supervisory power. Sound principles were not followed in developing the Plan or in the Plan itself, in that the court departed from the principles of the *Pepper* case (ante, p. 10), mistakenly introduced the holding of this court in *Hartford-Empire*, a patent infringement case, into bankruptcy law (ante, p. 12) and invented the questionable quasi creditor fiction which was later substantially modified (ante, p. 9). Departure from sound principles in developing the Plan is shown by the fact that the change in the value of Inland's assets during administration has repeatedly forced the courts below to retreat from or modify equitable principles previously employed to guide the reorganization. When in 1957 and 1958 the mistakenly applied principles failed to reach the "just result" from which Judge Simons was searching when the quasi creditor fiction was conceived (see italicized language ante, p. 13), the court, perhaps dismayed by the long course of these proceedings, resolutely refused to reconsider its earlier holdings but mechanically applied, the rules developed under quite different

[9]Findings of fact of District Court filed September 3, 1943.

conditions. That a just result was not reached is evident. Guilty Columbia receives the entire property and business of the debtors, although innocent public stockholders injured by Columbia's wrongdoings are ignored.

It is believed that if the court below had followed the *Pepper* case and disallowed Columbia's claims, it would not have had to create the fiction that American and Kentucky public creditors are creditors of Inland with the confusion which this fiction created later, necessitating numerous appeals and contests among creditors. If accepted principles had been folowed this case would have been soundly decided many years ago.

This court should upon review direct the courts below to follow accepted principles and (i) disallow Columbia's claims, (ii) order distribution of Inland's assets remaining after Inland's debts are paid to Inland's stockholders, including American and Kentucky, in proportion to their Inland stockholdings; and (iii) require allocation of the assets so received by American and Kentucky to their creditors and stockholders in the order of absolute priority. If this is done, a plan of reorganization will develop which will not require modification by reason of any change in the value of Inland's assets. These long drawn-out proceedings can be ended promptly with a just result, namely, the denial to Columbia of the fruits of its wrongdoing, and reparation as far as possible to the injured innocent public creditors and stockholders.

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4. The public interest and importance of this case does not lie in the number of instances in which the

questions here presented may arise; but rather in the impact which it will have, if allowed to stand, on the application of settled principles of bankruptcy administration.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully Submitted

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March 14, 1959

In the Matter of:
INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
AMERICAN FUEL & POWER COMPANY,
Debtors.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided January 15, 1959

Before SIMONS, MARTIN and MILLER, Circuit Judges.

PER CURIAM. These cases have been heard on motions of the trustee of American Fuel & Power Company [supported by the Columbia Gas Systems, Inc., the Green Committee for Independent American Fuel Note Holders, and the trustees of the debtors, Inland Gas Corporation and Kentucky Fuel Gas Corporation] to dismiss the appeals in these seven cases which were heard together, and on the opposition of the Securities and Exchange Commission and the several parties joining it in opposition to the dismissal of the appeals. This opposition, of course, involves opposition to the plan adopted in the district court and to its confirmation.

This appellate court has heard oral arguments of four attorneys in favor of the motions to dismiss and those of five attorneys opposing the dismissals. There have been considered also some twenty briefs filed by the attorneys for and against the motions.

The full history of this long-drawn-out litigation is disclosed by the numerous opinions of this court: *In re American Fuel & Power Company*, 122 F. (2d) 223 (C. A. 6); *Columbia Gas & Electric Corporation* v. *United States*, 151 F. (2d) 461 (C. A. 6); *In re American Fuel & Power Company, et al.*, 151 F. (2d) 470, affirmed by the Supreme Court, sub nom *Vanston Committee* v. *Green*, 329 U. S. 156; *Columbia Gas & Electric Corporation* v. *United States, et al.*, 153 F. (2d) 101 (C. A. 6); *In re Inland Gas Corporation, et al.*, 187 F. (2d) 813 (C. A. 6); *In re Inland Gas Corporation, et al.*, 208 F. (2d) 13 (C. A. 6); *In re Inland Gas Corporation; Harbison* v. *Williamson, et al.; Vanston* v. *William-*

son, et al.; Kern v. *Williamson, et al.; Green, et al.,* v. *Vanston, et al.,* 211 F. (2d) 381 (C. A. 6), certiorari denied, sub nom *Kern* v. *Vanston,* 348 U. S. 840; *In re Inland Gas Corporation, et al.,* 217 F. (2d) 207, (C. A. 6); *In re Inland Gas Corporation, et al.,* 241 F. (2d) 274 (C. A. 6), certiorari denied 355 U. S. 838 (1957).

Upon the last remand to the United States District Court, District Judge Ford had a full hearing with all interested parties appearing by counsel to consider whether a proposed plan, presented by the trustees of the several debtor corporations involved, is fair, equitable and feasible. Upon conclusion of the hearing, the district court entered an order finding the plan fair, equitable and feasible.

On June 2, 1958, the United States District Court entered an order confirming the plan of reorganization and overruling all objections to the plan and to its confirmation. It is obvious that the district judge attempted to the best of his ability and understanding—and we think successfully—to apply the principles stated in our last opinion [241 F. (2d) 374], and to put into full effect the mandate of this court. The evaluation which he put on the properties in issue was supported by substantial evidence and it cannot be said that his decision to follow the evaluation which he adopted upon expert testimony, rather than that of the Securities and Exchange Commission, was clearly erroneous. On the contrary, we find that the district judge exercised sound discretion in adopting the evaluation which he did, upon the basis of the expert evidence before him.

We are of opinion, further, that Judge Ford appropriately applied the adjudication of this court in 241 F. (2d) 374, with respect to post-bankruptcy interest and all other issues before him. Motions to dismiss are appropriate in the circumstances. *Long Beach Dock & Terminal Co.* v. *Pacific Dock & Terminal Co.,* 98 F. (2d) 833, 835 (C. A. 9), certiorari denied 305 U. S. 1020; *Securities and Exchange Commission* v. *Vacuum Can Co.,* 157 F. (2d) 530, 532 (C. A. 7), certiorari denied 330 U. S. 820.

The appeals are dismissed; and the judgment of the district court confirming the plan of reorganization is affirmed.

COLUMBIA GAS & ELECTRIC CORPORATION V. UNITED STATES ET AL., 6th Cir., 151 F. 2d 461 (1945)

NOTE: Only the Statement of Facts and the portion of this opinion relating to subordination of Columbia's claims are here copied. Headings below added.

(Organization of Debtors)

In the main, his (the District Judge) findings are not controverted insofar as they disclose the origin and purpose of the debtors and the story of Columbia's interest in their activities which follow. Inland Gas Corporation was incorporated in 1927, and Kentucky Fuel Gas Corporation in 1928, both for the purpose of producing, transporting and selling natural gas to industrial consumers. They were promoted by the same persons and financed by the same group of bankers, and each issued securities to the public and distributed its common stock to the promoters and underwriters as compensation for services. The promoters also, in July, 1928, organized the American Fuel & Power Company for the purpose of taking over and holding stock of Inland and Kentucky Fuel and other operating companies which might later be organized, in order to integrate and expand their operations through unified control and management. Stockholders of Inland and Kentucky Fuel exchanged their stock for stock in the holding company, and in July, 1929, American Fuel issued and sold to the public an issue of convertible gold notes, maturing July 1, 1934. The proceeds thereof were used to provide financial aid to the operating companies, and to acquire additional gas acreage and transmission lines. American Fuel also organized and financed other subsidiary companies for the purpose of having them acquire, hold and operate various properties.

(Competition by Debtors With Columbia)

During the same period Columbia, through numerous subsidiary corporations, was engaged in the production, transmission and sale of natural gas to both industrial and domestic consumers in Kentucky, West Virginia, Ohio, Indiana and other states. Such subsidiaries were connected by interstate transmission lines

and integrated, through unified management and operation, into what is known as the "Columbia System." The Columbia subsidiaries served both domestic and industrial consumers and so were public utilities subject to the rules and regulations of State Public Utility Commissions and the provisions of municipal franchises under which they operated. The result was that they could not contract with industries at fixed rates for definite periods because of the power of state and municipal authorities to change their rates and to require them to give preference to domestic consumers when gas was insufficient for both. The subsidiaries of American Fuel served only industrial users under private agreements, and all plans for expansion of the American Fuel system contemplated strict adherence to that policy. Being free from constraint by municipal franchises and state regulation, they had a substantial competitive advantage over Columbia wherever they came into competition with it.

Prior to the organization of American Fuel, Columbia was practically free from actual competition in the field occupied by its subsidiaries in Kentucky, Ohio and West Virginia, but during 1928, 1929 and a greater part of 1930, the operating subsidiaries of American Fuel, as a result of their competitive advantage, took from them some of their large industrial customers, including the American Rolling Mill Company. During 1929 and 1930, Columbia was engaged in developing a plan for the construction of a natural gas pipe line from its Kentucky and West Virginia fields to the eastern seaboard cities of Washington, Baltimore and Philadelphia. As originally planned, the project called for a large increase of gas reserves in West Virginia and eastern Kentucky, and to acquire such reserve Columbia embarked upon a large scale program for increasing its acreage. The gas acreage held by American Fuel was considered by it to be desirable. Inland and Kentucky Fuel had sustained substantial operating losses in 1928 and 1929, due to their heavy burden of securities and burdensome gas contracts, and so were never able to earn their fixed charges. Columbia knew of this precarious financial condition and that the indentures securing the bonds of Inland and Kentucky Fuel provided that upon their failure to meet interest of sinking fund requirements the indenture trustees could institute foreclosure proceedings upon the request of holders of 25% of their bonds. Anticipating such eventuality, and

to place itself in a position to force foreclosure and sale of the properties with an opportunity to purchase them at foreclosure, Columbia, in January, 1930, began to purchase Inland and Kentucky Fuel bonds on the open market by methods which concealed the fact that it was the purchaser, and by the end of April, 1930, had acquired in excess of 25% in principal amount of the bonds of both.

(Debtors' Plans for Expansion)

From the beginning of their operations, Inland and Kentucky Fuel were under the supervision and management of Hope Engineering Company, an organization with wide experience in successfully promoting and building gas transmission lines. It recognized the dubious financial condition of American Fuel and its subsidiaries, and realized that its only hope of survival was to secure capital not only to bridge its immediate difficulties, but to finance a large expansion of its business. The industrial area in and around Detroit, Michigan, not then supplied with natural gas, was conceived to be an inviting field, and Hope recommended that American Fuel make an effort to enter it. Plans for that purpose were formulated, and Hope succeeded in inducing American Utilities & General Corporation and Moody-Seagraves Company to join in the promotion. These companies united their resources and combined their efforts as a syndicate to construct a natural gas transmission line from Eastern Kentucky to Detroit which would pass through the heart of the territory then occupied and served by the subsidiaries of Columbia. American Utilities and General Corporation was a prosperous and successful investment trust, backed and controlled by G. E. Barrett & Company, a strong banking corporation which had financed many gas enterprises. Moody-Seagraves Company had successfully built and operated natural gas projects and had wide experience in their promotion. The Syndicate was considered to be a combination of sufficient financial strength and business experience to foreshadow success of the Detroit project and so prevent the impending financial collapse of the American Fuel System.

The Syndicate acquired voting trust certificates, notes, and a majority of the common stock of American Fuel, which gave it

complete control of that System. To prevent default in maturing obligations of American Fuel, Inland and Kentucky Fuel, Hope agreed to provide funds sufficient to meet their immediate sinking fund requirements. Operations of the Syndicate were carried on by and through corporations which it wholly owned and controlled. Through one it applied for a franchise to lay gas pipe lines in the streets of Detroit and entered upon a vigorous campaign to secure contracts from industrial consumers there as well as in the territory through which the proposed line would be constructed; through another its surveyed and acquired the right-of-way for the transmission line from the gas fields of Eastern Kentucky, including necessary permits for river crossings; and through still another it started acquiring additional gas acreage in Eastern Kentucky. The plan was for the Syndicate to provide sufficient money to advance the project to a point where its successful completion and profitable operation could be demonstrated, and then to sell bonds to the public in amount sufficient to finance completion. Contracts were obtained from industrial consumers in the Detroit area and elsewhere, and Ralph K. Davis, a nationally known and reputable gas engineer, was employed to investigate and analyze the proposed enterprise. After an exhaustive survey he reported the gas reserve to be sufficient, the industrial market adequate, and the project, as a whole, a sound business proposition which would be profitable to the gas company and of economic advantage to the industries of Toledo and Detroit.

(Elimination of Competition by Others Than Debtors)

During this time Columbia was also making plans to supply natural gas to the Detroit area. It made a survey of the market in Detroit, and while the application of the Syndicate for a franchise was pending, Columbia's executive committee passed a resolution providing for an extension of its existing gas transmission lines from Toledo to Detroit. The success of these plans was threatened not only by the plans of the Syndicate for the development of the American Fuel System, but also by the starting of a large pipe line for the transmission of natural gas from the Texas Panhandle and the Hugoton gas fields of Kansas, which was proposed to be extended into Ohio, Michigan and Indiana and make gas available to cities then supplied by Columbia, and also to Detroit

toward which Columbia was planning. In addition, the United Carbon Company, with acreage in Eastern Kentucky, had announced an intention to build a natural gas pipe line to Cincinnati for the purpose of supplying gas to that city in competition with Columbia, and proposed to furnish natural gas to a number of Columbia customers in the Cincinnati area at a substantially reduced rate. United Carbon Company's threat was averted through the purchase of all of its gas by Warfield Natural Gas Company, a Columbia subsidiary. Competition from the Texas and Hugoton fields was avoided through purchase of complete control of that project by Columbia Oil and Gasoline Corporation, another Columbia subsidiary, entailing an investment of more than $30,000,000. Meanwhile, Columbia continued to acquire bonds and debentures of the American Fuel System until it had acquired approximately 42% of Kentucky Fuel obligations and approximately 36% of the obligations of Inland, representing an aggregate expenditure of between three and four million dollars.

(Columbia's Purchase of Stock Contract of Debtors)

On October 30, 1930, Columbia purchased the Syndicate's entire holdings in the American Fuel System, and all other corporations which had been organized by the Syndicate for the promotion and development of the Detroit project. This purchase included 76% of the outstanding common stock of American Fuel, together with all claims and securities held by the members of the Syndicate in American Fuel and its subsidiaries. The price paid by Columbia returned to the Syndicate members all that they had invested, and gave them a clear profit of $350,000. In addition, Columbia guaranteed to employ Hope to perform natural gas engineering work on at least $20,000,000 of construction projects within a period of three years, for which it agreed to pay Hope a compensation of 4%,—an obligation which it later discharged by paying Hope $400,000 without any work being done by Hope. The Syndicate delivered resignations of all officers and directors of American Fuel, its subsidiaries and other associated corporations, and they were replaced by persons designated by Columbia. Nominees of Columbia were made voting trustees of a majority of the capital stock of Kentucky Fuel. Columbia

agreed to hold the members of the Syndicate harmless by reason of the obligation of Hope to provide funds to meet sinking fund requirements of Inland and Kentucky Fuel, and in respect to any obligation imposed by gas contracts entered into with industrial consumers, and from certain obligations under leases of gas acreage.

(Receivership Forced by Columbia)

By the use of certain of its claims Columbia promptly initiated receivership proceedings against Inland and Kentucky Fuel, and its nominee, Lockhart, was appointed receiver. There were no further efforts to advance the Detroit project. The negotiations pursuant to which Columbia had acquired from the Syndicate control of the American Fuel System, were inaugurated by C. R. Seagraves, President of the Moody-Seagraves Company, as his confidence in the ability of the Syndicate to successfully complete the Detroit project had been considerably shaken by reason of the financial depression and the depleted financial strength of the members of the Syndicate.

(Finding on Columbia's Intent)

There is substantial credible evidence that from the very beginnings of the promotions that led first to the incorporation of Inland, then to the organization of the American Fuel System, and later to the organization of the Syndicate which proposed to construct the Detroit pipe line, Columbia was fully conscious of the threat to its subsidiaries that these organizations would present with the competitive advantage afforded by their immunity from state and municipal regulation. It manifested early and continued hostility to the venture, and exerted every possible influence to thwart its successful fruition. It early lodged a complaint with the Better Business Bureau of New York in respect to the financing of Inland; it manifested great concern over the taking from its subsidiaries important industrial customers in their territory; it kept itself completely informed as to the financial and operating activities of American Fuel and its subsidiaries and the provisions of their contracts for gas. Though

fully informed of the unsoundness of their financial structure and their improvident gas contracts, it began in January of 1930 secretly to purchase bonds and securities of Inland and Kentucky Fuel at but little discount from their par values. Its president declared that 'if anyone thinks Columbia will allow a ditch to be dug across the State of Ohio, he is just crazy,' and that if Columbia came into the picture it would have to 'put the company [American Fuel] through the wringer.' Finally, though now proclaiming that American Fuel and its subsidiaries were unsoundly financed, that neither it nor its subsidiaries could meet their fixed charges and sinking fund requirements and were headed for receivership, it paid approximately $3,000,000 for stock control and assumed heavy obligations subsequently liquidated by substantial payments. It is true that much of this evidence was controverted, but we are not able to say that the district judge, who had advantages superior to ours for determining the truth, was clearly wrong in the determinations, expressed and implicit in his findings, especially when viewed against a background of evidence pointing clearly to restraint of competition from sources other than Kentucky gas fields.

• • •

(Columbia's Arguments Considered and Rejected)

The argument that the court, for alleged violations of the Anti-Trust Laws, imposed in a bankruptcy proceedings penalties other than those specified in the Anti-Trust Statutes, must be rejected. The court imposed no penalties; it but exercised its equity power to deny relief to a creditor seeking enforcement of contracts entered into illegally or tainted with inequity. To apply the doctrine so vigorously urged by Columbia, is to deny the power and duty of equity, to reject demands arising out of illegal or inequitable conduct whenever such conduct is subject to legal penalties imposed by state or federal law, and so to limit it to that narrowly restricted field in which the chancellor may sense inequity even in the absence of statutory condemnation. A denial of this contention does not mean, of course, that the power may be invoked in respect to conduct constituting no wrong to the parties or interests in litigation.

(Hartford-Empire Case Considered)

In our view, Columbia receives no support from the case of Hartford-Empire Co. v. United States, 323 U. S. 386, 65 S. Ct. 373, wherein it was held that the use of patent positions to allocate fields of manufacture and to maintain prices, violated the Anti-Trust Laws and could be restrained, but that the court was without power to compel action, which amounts to a forfeiture of patents. Columbia correctly points out that there is no distinction between a patent and a bond; both are a species of property and neither can be confiscated because of past uses. But its contention in other respects ignores the fundamental basis of the Hartford-Empire decision which, in line with Morton Salt v. Suppiger and B. B. Chemical Co. v. Ellis, supra, denies enforcement of patent rights against infringers, so long as the patent owner is using his patent in violation of the Anti-Trust Laws. It may well be, under the facts of the Hartford-Empire case, that there remained to the appellants there, property rights which, when their owners had abandoned their illegal use and been purged of inequity could still be enforced against subsequent infringers. Such rights the court would not allow to be confiscated. This doctrine has no application to the present status of Columbia, at least in respect to the subordination of its claims by the decree. In that respect the decree merely denies enforcement of the Columbia claims precisely as the Hartford-Empire decision denies enforcement of patents illegally used against those infringing during such illegal use. The fruits of Columbia's inequitable activities are still retained in its freedom from competition by American Fuel, and Columbia's suggested remedy would still leave wronged stockholders and creditors without relief, for a restoration of the status quo ante is manifestly now impossible. It may be as suggested by the S. E. C. that, under the facts of the case, the distinction between subordination and rejection is purely academic, but submissiveness in principle to the doctrine of the Hartford-Empire case, perhaps requires an amendment to the decree, limiting the remedy of the petitioners to the subordination of the Columbia claims.

STATUTES

Sec. 2 of the Bankruptcy Act, 66 Stat. 420, 11 U. S. C. Chap. 2, Sec. 11 (2).

§ 2. *Creation of Courts of Bankruptcy and Their Jurisdiction.* a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

* * *

"(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * *"

Sec. 57k of the Bankruptcy Act, 52, Stat. 866, 11 U. S. C. Chap. 6, Sec. 93 (k):

"k. Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

Sec. 221 (2) of the Bankruptcy Act, 52 Stat. 897, 11 U.S.C. § 621 (2):

"Sec. 221. The judge shall confirm a plan if satisfied that—

* * *

(2) the plan is fair and equitable, and feasible;"

Inland Gas Corp. et al., 187 F. 2d 813 (1951):

* * *

The Columbia Claims

When the controversy first claimed our attention in 1941 it was upon an appeal by creditors of the American Fuel & Power Company, seeking to set aside an order approving a settlement between the trustees of the debtors and the Columbia System. In an exhaustive opinion we held that Columbia had acquired its securities and stock in pursuance of an illegal and inequitable scheme to destroy competition with it by the American Fuel & Power Company and its affiliates, that under the facts of record no principle of equity, morals or law required the court to lend its aid to further a scheme abhorrent to all recognized rules of right and justice. The orders of the court were reversed and the causes remanded with direction that all claims or stock interests of Columbia against the debtors be rejected.

Columbia, not having been a party to the proceedings in that case and so not bound by it, the district court conducted extended hearings upon the Columbia claims, and applying the law as we found it to be, entered orders upon detailed findings of fact and conclusions of law rejecting them all. Again there were appeals mainly by Columbia, challenging the judgment. After careful consideration of the findings and conclusions of the court, and an extended six volume record, we accepted the findings of the district judge but limited the remedy to the subordination of Columbia 'claims to the 'claims of all other creditors in every class.' Petitions for amendment and clarification of our mandate were later denied. 6 Cir., 153 F. 2d 101.

(Discussion of Hartford-Empire Case)

When our decision was rendered on November 26, 1945 in Columbia Gas & Electric Corp. v. United States, supra, the Supreme Court had but recently decided the case of Hartford-Empire Co. v. United States (Jan. 18, 1945), 323 U. S. 386, 65 S. Ct. 373, 89 L. Ed. 322, wherein the court denied relief for infringement of patents illegally used against those infringing during such illegal use, but declined to hold the patents invalid. We thought that under the facts of that case there might well remain to the appellants property rights which, when their

owners had abandoned their illegal practices and been purged of inequity, could still be enforced against subsequent infringers, and that it was for that reason the court would not permit them to be forfeited. We perceived an analogy between the patent rights there preserved and the claims of Columbia here involved, and so while we approved the findings of the district court that the conduct of Columbia in acquiring its securities was inequitable and illegal, we concluded that subordination of its claims to those of other creditors was a more appropriate remedy than their complete rejection. We were probably led to this also by the view of the SEC that upon the facts of the case then developed, the distinction between subordination and rejection was purely academic. Mature consideration leads to the conclusion that the analogy between Columbia securities here and the patents involved in the Hartford-Empire case, supra, is not as close as it then appeared to us to be. The Supreme Court found no evidence that the patents there involved had been illegally or fraudulently obtained. It was their inequitable use that led to the adjudication and there still remained the possibility that when such inequitable use was discontinued and their owners purged of inequity a legitimate property right against subsequent infringers might thereafter be maintained. Here the securities of Columbia were tainted with inequity from the very beginning, and no reasonable expectation may be indulged that in the present status of the debtors there may come a time when Columbia may assert any right in such securities as against creditors who have not been injured by its illegal and inequitable conduct. This is not to say that subordination is not a more appropriate remedy than rejection, in view of the principle applied in the Hartford-Empire case, if by it a just result may be reached. Nor are we precluded by our previous mandate, even if susceptible to the interpretation put upon it by the district court, from considering whether the plan of reorganization, now for the first time presented, is, in the light of all circumstances brought forth, fair and equitable, since the allowance of claims in bankruptcy remains interlocutory until the estate has been closed, New York N. H. & H. R. Co. v. Reconstruction Finance Corp., 2 Cir., 180 F. 2d 241, 243, and no application of the principle of 'the law of the case' need deter us from so doing, in an exceptional case, which this is, Reynolds Springs Co. v. L. A. Young Industries, 6 Cir., 101 F.2d 257, 259

however such principle may circumscribe the action of a district court. (pp. 815, 816)

* * *

(American and Kentucky Public Creditors Are Quasi Creditors of Inland)

We are not advised by this record of the circumstances under which or the representations by which the gold notes of American Fuel supported by the pledge of Inland stock, were sold, and the trust indenture under the terms of which they were issued is not here. The inference is inescapable, however, that the main reliance of the public investors in such securities must have been the Inland stock, based upon Inland assets and pledged for their benefit by American and Kentucky. We are aware that some of the appellants contend that at that time Inland stock had little or no value. The fact remains, however, that the investors must have relied, to large extent, upon the assets of Inland. If not, why was Inland stock pledged? The purpose of the issue was to rehabilitate Inland, to save it from debt default and to increase its holdings of gas acreage, and the inference is likewise inescapable that this must have been understood by the investors. Moreover, it now appears that through excellent management by its trustee Inland assets are sufficient to pay all of its debts exclusive of the claim of Columbia, so that the expectation of its rehabilitation was not wholly vain. Besides, the entire reorganization structure now planned rests upon the assets of Inland. So viewing it, we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland, and that whatever the formal arrangement may have been a realistic view is that they are entitled to creditor status in the plan of reorganization. Certainly a court of equity, particularly in a bankruptcy reorganization, has the power and likewise the duty to look through form to substance. Since this creditor status may practically be recognized only through the medium of Inland stock owned by American and Kentucky without raising problems of distribution and priorities, the court is directed to amend the plan of reorganization to subordinate Columbia claims to the stock of Inland and assign the residue of

Inland assets over its debts, exclusive of Columbia's claims, to the account of their public creditors according to the respective stock interests of 72.6% for American and 26% for Kentucky. Whether this means that we have subordinated securities to stock or have subordinated them to debts, measured by the respective pledges of stock, seems to us immaterial for the result will be the same. Having perceived a creditor status for the holders of securities supported by Inland stock, we are unable to make any provision for the minor interest of 1.4% of the common stock of Inland directly held by public investors, as recommended by the SEC. The holders of such stock were in no sense creditors. (p. 817)

(American Has Not Overreached Inland)

It is urged by various Inland creditors that the general claims of American Fuel should be disallowed as debts and construed as contributions to capital. On behalf of Kentucky the Vanston Committee takes the position that its claims should be given priority over those of American Fuel. We find no error in the court's rejection of these contentions. It must be remembered that American Fuel did not organize Inland but was created by it, and that the funds advanced to Inland were to save it from default and to increase its chances for survival. The court found nothing in the record to justify any conclusion that Inland or its creditors were in any way injured or over reached by American Fuel, and we find none. We perceive no unfairness in permitting American Fuel to participate on a parity with other creditors. The district court's findings in that respect are affirmed.

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JAMES R. BROWNING, Clerk

Nos. 765, 766 and 774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 765

CHARLES L. GREGORY, *et al.*,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 766

PAUL E. KERN,

Petitioner,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 774

ELMO E. ALLEN, *et al.*,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

CONSOLIDATED BRIEF OF THE COLUMBIA GAS SYSTEM, INC. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ON PETITIONS FOR WRITS OF CERTIORARI

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Ticonic National Bank v. *Sprague*, 303 U. S. 406 (1938) 9, 15, 16

United States v. *Bloom*, 342 U. S. 912 (1952) 9

United States v. *Edens*, 342 U. S. 912 (1952) .. 8, 10, 19

United States v. *General Engineering & Mfg. Co.*, 342 U. S. 912 (1952) 9

Vanston v. *Green*, 329 U. S. 156 (1946) 18

OTHER:

2 Blackstone, Commentaries *488 8

DEFINITIONS AND REFERENCES

American, Inland and Kentucky: Respectively, American Fuel & Power Company, Inland Gas Corporation and Kentucky Fuel Gas Corporation, the debtors in the three proceedings under Chapter X* of the Bankruptcy Act in the District Court for the Eastern District of Kentucky.

Post-bankruptcy interest: Interest after the institution of a receivership, bankruptcy or reorganization proceedings; this term is generally used in bankruptcy cases, whether in proceedings for liquidation, reorganization or arrangement.

Citations to the opinions below are to the reproductions thereof contained in Appendix A to the Petition in No. 765.

Emphasis has been supplied to quotations in which emphasis appears.

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*The various Chapters and Sections of the Bankruptcy Act are fully cited in the Table of Authorities and are referred to herein only by original Chapter or Section numbers.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is it the general rule of law that interest on unsecured claims against an insolvent debtor (including a debtor in proceedings under Chapter X of the Bankruptcy Act) ceases to accrue at the institution of bankruptcy proceedings?

2. Was it error or an abuse of discretion for the Court of Appeals to adhere to that general rule (affirming the District Court in that regard) in the circumstances of this case?*

3. Did the Court of Appeals abuse its discretion in refusing to reopen and reconsider determinations "previously, and repeatedly, made" in these reorganization proceedings?**

COUNTERSTATEMENT OF THE CASE

(a) The 1957 Petitions

The questions presented by these Petitions are the same questions which the same Petitioners sought to bring here on certiorari in 1957 (Nos. 241, 325, 336 and 342, October Term 1957; *cert. denied*, 355 U. S. 838). *Then* (1957), the District Court had refused to confirm a plan of reorganization which allowed post-bankruptcy interest to the unsecured Kentucky creditors and had directed the Trustees of the Debtors to prepare a plan which did not allow such

*The foregoing questions are presented by the Petitions in Nos. 765 and 766 (referred to in this Brief as the Gregory-Vanston Petition and the Kern Petition, respectively, and jointly as the Kentucky Petitions).

**The foregoing question is presented by the Petitions in No. 774. That Petition is referred to in this Brief as the Allen Petition.

interest; the Court of Appeals had affirmed that order (one judge dissenting) and certiorari was denied. *Note* (1959), after the Trustees have prepared and filed a plan (the Plan) embodying the fundamental premises established by the 1957 decision; after the detailed and comprehensive statutory proceedings contemplated by the District Court's prior order have been completed with the confirmation of the Plan, and the Court of Appeals has unanimously affirmed the orders of the District Court, the same Petitioners again seek certiorari.

Although, in form, the Petitions seek review of the Court of Appeals' 1959 decision, in every substantial aspect this is (as those Petitions themselves make abundantly clear) a second effort to obtain review of the 1957 decision.*

We will not burden the Court with a statement or an argument as detailed as we made in 1957.

We respectfully refer the Court to our Consolidated Brief in opposition to Petitions Nos. 325, 336 and 342 (October Term, 1957), and our Brief in opposition to Petition No. 241 in that term.

(b) The Salient Facts

The 1959 decision of the Court of Appeals (like its 1957 decision) was a decision which applied, in a Chapter X

*Petitioners attribute this Court's denial of their 1957 petitions to the fact that the 1957 order, although reviewable, was not a final order. While we fully realize that denial of certiorari is in no sense decisional, and that the 1957 order was not technically a "final order", we point out that it was nevertheless an order embodying fundamental plan premises, upon the basis of which a new plan was to be (and has been) prepared. Petitioners' view, that this Court denied certiorari because of nonfinality, attributes to this Court the intent to impose upon the parties, the estate and the courts below the burden and delay of preparing a new plan built on erroneous fundamental premises, District Court proceedings relating to it and another round of appeals to the Court of Appeals—all of this in proceedings which had then already lasted 27 years.

reorganization, to a complicated security structure involving complex intercorporate relationships set against the background of many years of litigation, the well-established rule that unsecured claims do not bear post-bankruptcy interest.

The salient facts are these:

(1)

The Debtors in the three Chapter X proceedings are affiliated corporations; the valuable operating assets and business are owned by Inland; and Inland's stock is owned 72.6% by American and 26% by Kentucky, and the latter's stock in turn is also owned by American. American has assets other than its Inland stock; Kentucky has none.

Respondent, The Columbia Gas System, Inc. (Columbia), holds direct claims against Inland, secured by First and Second Mortgages on the Inland assets.

(2)

The Kentucky Petitioners are unsecured creditors of Kentucky, and are not direct legal creditors of Inland. They seek to recover post-bankruptcy interest from Inland assets. Their rights to recover anything from Inland assets (limited to their principal, as the courts below have held) derive from several previous equitable intercessions in their behalf by the court below, *viz.*: (a) in 1945 the Court of Appeals ordered, in each of the three pending Chapter X proceedings, that the claims of Columbia against the Debtor be subordinated to the claims of other creditors;* (b) in 1951, by which time Inland's assets had become more than sufficient to provide full principal and interest to date of payment on the Inland First Mortgage Bonds

*Columbia Gas & Electric Corporation v. United States, et al., 151 F. 2d 461 (6th Cir. 1945).

and Second Mortgage Debentures owned by others than Columbia, the Court of Appeals declared the public holders of American Notes and Kentucky Bonds to be "quasi-creditors" of Inland, and entitled to share in the residue of Inland assets according to their respective stock interests * and (c) in 1954, when it developed that the 72.6% residue of Inland assets would be more than sufficient to provide for the claims of American's creditors, the Court of Appeals again exercised its equity powers on behalf of Kentucky creditors and directed that the balance of this 72.6% excess not required for American creditors be assigned to payment of Kentucky's "secured" obligations.**

It is this "quasi-creditor" claim of the unsecured Kentucky creditors against the assets of Inland upon which the courts below have refused to award post-bankruptcy interest.

(3)

The successive equitable intercessions referred to above demonstrate that the Court of Appeals is well aware of the breadth of its equity powers. In the 1957 decision it expressly pointed out that under *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, and *Pepper* v. *Litton*, 308 U. S. 295, it had authority to disallow the claims of Columbia; it said that it had repeatedly declined to do so and

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*In re Inland Gas Corp., 187 F. 2d 813 (6th Cir. 1951). The decision was based on the belief that the Kentucky Bonds were secured by a pledge of the Inland stock (27%) owned by Kentucky and that the American Notes were secured by a pledge of the Inland stock owned by American (72.6%). The belief is true with respect to the American Notes. It was determined after full hearing in 1955, however, that the Inland stock never had been pledged to secure the Kentucky Bonds.

**In re Inland Gas Corp., 211 F. 2d 381 (6th Cir. 1954).

it did so again; and that Columbia was therefore entitled to stand upon its rights as a creditor.*

In its 1959 decision, the Court of Appeals affirmed Judge Ford's orders approving and confirming the Plan which provides for the payment to the unsecured Kentucky creditors (from Inland assets) of the principal amount of their claims, but does not give them post-bankruptcy interest. It did this after hearing again, on briefs and oral argument, the pleas addressed to its equity powers which it had heard in 1957. It said, in effect, that the Plan carried out the intent of its 1957 decision:

> "We are of opinion, further, that Judge Ford appropriately applied the adjudication of this Court in 241 F. 2d 374 with respect to postbankruptcy interest and all other issues before him."**

(4)

While no one can purport to catalog the equitable considerations which may have been weighed by the courts below, derived from their many years of experience in these proceedings, they may properly have included the fact (of which both courts were well aware) that the interests represented by the Kentucky Petitions are almost entirely "seasoned Wall Street speculators" who, upon receipt of the principal amount of their claims alone, will reap very substantial gains. The Court of Appeals referred in 1957, for example, to the interest and prospects in these proceedings of the most vociferous of the Kentucky Petitioners (Kern):

> ". . . Kern was not an original investor in the Kentucky bonds and debentures but began buying

*In re Inland Gas Corp., 241 F. 2d 374, 382 (6th Cir. 1957); Gregory-Vanston Petition App. pp. 23a-24a.

**In re Inland Gas Corp., 262 F. 2d 510, 511 (6th Cir. 1959); Gregory-Vanston Petition App. p. 6a.

> Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors. . . . If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid." (241 F. 2d 374, 376; Gregory-Vanston Petition App. pp. 10a-11a).*

(5)

Now, for the first time in their 29-year history, these proceedings have reached the stage at which a plan of reorganization has been "approved" and "confirmed" by the District Court. During this 29-year period the operations of Inland have produced cash sufficient to pay in full (principal and interest to the date of payment) Inland's First Mortgage Bonds and Second Mortgage Debentures held by others than Columbia—a total payment of $8,104,063. The plan which has now been "approved" and "confirmed" (appeals dismissed by the Court of Appeals) will, when carried into effect, complete payment in cash to the secured American Notes of their principal and interest to the date of payment and will pay the unsecured Kentucky Bonds and Debentures in cash their full principal amount. Columbia, whose First and Second Mortgage claims against Inland for principal and secured interest amount to $5,090,000, will obtain the equity valued by the District Court at $3,060,000.

*The present plan does not involve the risk of "the tax claim" referred to by the Court of Appeals.

ARGUMENT

In Opposition to the Kentucky Petitions

I. THE DECISIONS BELOW DO NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW.

A. Introductory

The 1957 and 1959 decisions of the Court of Appeals adjudicated a very narrow and abstruse point, a point impossible to isolate from the exercise, in the unique situation of this case, of the equitable powers of the bankruptcy court and a point virtually impossible of recurrence. They decided in a Chapter X reorganization, on the particular complex facts here involved, that unsecured creditors of a corporation without assets, who had been determined for equitable reasons to be "quasi-creditors" of an affiliated corporation with assets, are not entitled to post-bankruptcy interest as against a direct secured mortgage creditor of the corporation with assets, whose claims had been subordinated for equitable reasons.

Decisions such as these obviously do not raise any important questions of Federal law. In order to compose plausible petitions for certiorari, Petitioners have been forced to construct a distorted picture of pre-existing corporate reorganization law, which they can say the decisions below disturb.

When the decisions below are viewed in the context of the prior law, correctly stated rather than distorted, it is obvious that they disturb nothing. They simply represent application, to the unique and complicated facts of this case, of legal principles firmly established by decisions of this Court, coupled with a permissible exercise by the court below of its equitable powers in bankruptcy.

B. The Correct Legal Context of the Decisions Below

1. The Rule as to Post-Bankruptcy Interest

That interest stops at the date of bankruptcy is an ancient rule in Anglo-American jurisprudence, 2 Blackstone, Commentaries *488. This Court, per Mr. Justice Holmes in *Sexton* v. *Dreyfus*, 219 U. S. 339, 344 (1911), recognized its fundamental nature:

> ". . . [T]he rule was laid down *not* because of the words of the statute *but as a fundamental principle*. We take our bankruptcy system from England, and we . . . assume that the fundamental principles upon which it was administered were adopted by us when we copied the system . . ."

In *New York* v. *Saper*, 336 U. S. 328 (1949), a straight bankruptcy proceeding, this Court reaffirmed the "fundamental principle" and held the rule applicable to unsecured claims for taxes, even though such claims have a statutory priority. Mr. Justice Jackson, writing for the Court, reviewed provisions of the Bankruptcy Act which were argued to make inapplicable the "fundamental principle" and said:

> ". . . *No provision permits post-bankruptcy interest on other claims in general* or tax claims in particular . . . Tax claims are treated *the same as other debts* except for the first priority of payment § 64(a), 11 U. S. C. § 104(a), and the provision making taxes nondischargeable, § 17, 11 U. S. C. § 37" (336 U. S. at 331-32).*

*The Kentucky Petitions assert that the rule against post-bankruptcy interest reaffirmed by this Court in *Saper* and in its subsequent decision in *United States* v. *Edens*, 342 U. S. 912, is applicable only to tax claims. That assertion is frivolous since (i) the "fundamental principle of the English bankruptcy system which we copied"—that interest on unsecured debts stops at bankruptcy—has long been recognized by this Court as applicable to unsecured debts that are not claims for taxes (*e.g.*, *Sexton* v. *Dreyfus*, 219 U. S. 339 (1911);

There are certain exceptions to the rule; *Saper* referred to two of them and this Court has previously recognized the third:

> (1) "[I]f the alleged 'bankrupt' proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor . . ." (336 U. S. at 330)
>
> (2) "[I]f securities held by a creditor as collateral produced interest or dividends during bankruptcy such amounts were applied to post-bankruptcy interest . . ." (336 U. S. at 330)
>
> (3) If the value of the pledged property is more than sufficient to pay principal, the excess value will be applied toward post-bankruptcy interest on a secured claim. *Ticonic Nat'l Bank* v. *Sprague*, 303 U. S. 406 (1938); *Coder* v. *Arts*, 213 U. S. 223, 245 (1909).

2. Application of the Rule in Corporate Reorganization

After *Saper*, *per curiam* decisions of this Court in 1952 applied the rule against post-bankruptcy interest to proceedings under Chapter X (*United States* v. *Edens*, 342 U. S. 912), Chapter XI (*United States* v. *General Engineering & Mfg. Co.*, 342 U. S. 912), and in a general assignment for the benefit of creditors (*United States* v. *Bloom*, 342 U. S. 912).

The brief for the United States in *Edens* unsuccessfully contended that the "fundamental principle" against post-bankruptcy interest, which had originated in "straight" bankruptcy proceedings, was inappropriate in a reorganization proceeding, that the Section 63 definition of provable

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Thomas v. *Western* [illegible] *o.*, 149 U. S. 95 (1893)) and (ii) the ration[illegible] of *Saper* was [illegible] "Congress *assimilated* taxes to other debts for all purposes, including denial of post-bankruptcy interest", not that Congress *differentiated* taxes from other unsecured debts.

claims did not apply in Chapter X and that the "fundamental principle" violates the "strict priority" doctrine.*

C. Application by the Court Below of These Legal Principles

The decision of the court below affirmed, as fair and equitable, the Plan's provisions that:

(i) the secured Notes of American are entitled to payment of principal and full interest to date of payment ($4,705,597);

(ii) the unsecured Kentucky Bonds and Debentures are entitled to recover remaining unpaid principal from the assets of Inland ($2,466,316), but not post-bankruptcy interest; and

(iii) after such payments, Columbia is entitled to payment of the principal of its direct secured First and Second Mortgage claims against Inland together with post-bankruptcy interest** thereon.

Application of the rule of law against payment of post-bankruptcy interest on unsecured claims clearly justifies denial of post-bankruptcy interest to the unsecured Kentucky Bonds and Debentures. Kentucky Petitioners do

*Brief for United States, pp. 4-5, 8-9, 16-17, 20-21, *United States* v. *Edens*, 342 U. S. 912 (No. 299, 1952).

Courts of Appeals of both the First and Second Circuits have held that "strict priority" does not create a claim for post-bankruptcy interest in reorganization proceedings, *Massachusetts* v. *Thompson*, 190 F. 2d 10 (1st Cir. 1951), *cert. denied*, 342 U. S. 918, *New York* v. *Feinberg*, 204 F. 2d 502 (2d Cir. 1953). The First Circuit decision was rendered in a Chapter XI proceeding at a time when "strict priority" was there applicable; subsequently, amendment of the Bankruptcy Act eliminated the "fair and equitable" requirement from Chapter XI, c. 579, § 35, 66 Stat. 433, effective October 7, 1952.

**Existing values permit recovery of only a portion of such post-bankruptcy interest.

not contend that their claims fall within any exception to the rule against post-bankruptcy interest. Application of the rule of law permitting payment of post-bankruptcy interest on secured claims to the extent of their security clearly justifies the payment of post-bankruptcy interest to the holders of American Notes and to Columbia on account of its secured claims against Inland.

Two facets of the Kentucky Petitioners' challenge to the decision below are contentions that (i) neither American Notes nor Columbia's Inland Bonds and Debentures are secured claims, and (ii) the court's decision to permit recovery by Columbia of secured interest on its Inland Bonds and Debentures resulted from a belief that it did not have equitable power to disallow such interest. None of these objections has a shred of merit or poses any question of importance in Federal law.

1. The Secured Status of the American Notes

The American Notes are fully secured claims because American has assets, of a value in excess of the principal and full interest on the Notes, pledged to secure them. The assets of American, other than the 72.6% of the stock of Inland owned by it, have a value of almost $2,000,000. That Inland stock, for purposes of determining the value of the American Note security, also has substantial value. Clearly the "quasi-creditor" decision of the court below (187 F. 2d 813 (1951)) was not intended to put the public creditors of American or Kentucky in a worse position than they would have enjoyed absent that decision. If quasi-creditor claims against Inland were to be disregarded, Inland, even after payment of full principal of and interest on all claims against it (including Columbia's) would be solvent and the 72.6% of its stock owned by American would have a value of almost $3,000,000. Thus, under normal principles of reorganization law there is a fund of almost

$5,000,000 available to the American Noteholders (an amount more than sufficient to pay to them full principal and post-bankruptcy interest). (Applying the same hypothesis to the Kentucky Bond and Debenture holders, the available fund is significantly less than the principal which the Plan permits them to recover from the assets of Inland.)

2. The Secured Status of Columbia's Inland Bonds and Debentures

The secured status of the Inland Bonds and Debentures as a class is not questioned by the Kentucky Petitioners. The fact that Columbia's claims have been subordinated cannot be asserted to have destroyed their secured status. The court below, the author of the subordinations of Columbia's claims, has determined that Columbia's claims must be considered as "existing" and "valid" (*In re Inland Gas Corp.*, 241 F. 2d 374, 382 (6th Cir. 1957); Gregory-Vanston Petition App. p. 23a). It cannot seriously be contended that the court below was without power to define the affect of subordination on the secured status of Columbia's Inland claims. In its 1957 decision, the court below held that Columbia's claims against Inland are not to be subordinated to the payment of post-bankruptcy interest on unsecured claims against Kentucky, and it pointed to the necessary consequences of that delimitation of the appropriate level of Columbia's subordination *viz.*, that, when such subordination has been carried out, "Columbia is entitled to stand upon its rights as a creditor" and, as a creditor, "is entitled . . . to its rights in the remaining assets" of Inland (*Id* at p. 24a).

3. Awareness of the Court Below of the Full Scope of its Equitable Power

The history of the frequent recourse by the court below to its power to deal as equity requires with rights of credi-

tors and priority of claims is sketched in the Counterstatement of the Case, page 3, *supra*. As noted in that Counterstatement, the court below in its 1957 decision once again made clear that it understood the plenary scope of its equitable powers. To suggest, as do the Kentucky Petitioners, that the decisions below are a result of a failure to appreciate those powers or of a belief that they are limited by the decision of this Court in *Saper*, is simply frivolous.

D. The Kentucky Petitioners' Attempts To Distort the Legal Context of This Case

The Kentucky Petitioners portray the decisions below as having "sweeping impact" upon corporate reorganization law and they blame this on "confusion" resulting from the *Saper* case. The Kern Petition is particularly dramatic:

> "The decision vitiates salient aspects of the Court's landmark decisions in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, and *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 . . ." (p. 9).
>
> "This has come as a great shock to the financial community . . ." (p. 10).

This is nonsense of a high order.*

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*The financial community and members of the corporate reorganization bar are well aware that "strict priority" requires that a plan make adequate compensation for each of the following, in the order of their priority, before it compensates the next in line: (1) to the extent secured, first mortgage claims and interest to the effective date of the plan; (2) to the extent secured, second mortgage claims and similar interest; (3) unsecured claims and similar interest upon them (by virtue of the solvency exception); (4) preferred stock and, if cumulative, accrued dividends thereon; (5) common stock.

Obviously the unique question presented by the instant case can have no impact on the financial community generally.

The spurious character of Petitioner's effort to inflate the decisions below (and of his assertion of confusion resulting from *Saper*) is well demonstrated by his historical treatment of pertinent reorganization law.

1. Petitioner's Historical Review of Reorganization Law—"Pre-Saper"

Since the basic point which Kern chooses to make is that the decisions below have had "sweeping impact" on the reorganization law applicable to interest on *unsecured* claims, it is essential that he first construct a history of reorganization decisions apparently applicable to such interest. To demonstrate that *Saper* is, unwittingly, the villain, Kern creates his own conception of "pre-*Saper*" reorganization law. He begins this (Kern Pet., p. 15) with the high-sounding pronouncement that:

> "... this Court's pre-*Saper* decisions emphasized the respect to be accorded to post-petition interest in statutory reorganizations."

This amorphous generalization is then followed by a discussion of reorganization decisions of this Court, *every one* of which dealt with interest on *secured* claims. For example, the Kern Petition cites in support of its historical generalization:

***Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510.**

But there this Court held it error to confirm a plan which made provision for *stockholders* of a parent company and no provision for accrued interest on mortgage bonds of its operating subsidiaries. In the *Milwaukee* case referred to next below, this Court itself described this decision thus:

> "In *Consolidated Rock Products* v. *Du Bois*, we held that, under Section 77B, interest on *secured*

claims accrued to the effective date of the plan was entitled to the same priority as the principal" (318 U. S. 523, 546).

***Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. R. Co.*, 318 U. S. 523.**

There, as to a *stockholders'* argument that interest could not accrue on mortgage bonds after the date of the petition, the Court referred to its *Consolidated Rock Products* decision (see quotation just above) and held the principle equally applicable under Section 77. The syllabus (318 U. S. 523, 525) states the holding on this point thus:

> "Section 77 does not preclude the accrual of interest on *secured* claims after the date of the filing of the petition for reorganization."

***R.F.C.* v. *Denver & R. G. Western R. R. Co.*, 328 U. S. 495.**

This case has obviously nothing to do with interest on unsecured claims, because such claims were eliminated by the plan (pp. 501-502). This Court, at page 521 said:

> "The effective date of the plan was fixed by the Commission as January 1, 1943. This was in its power. The allocation of the securities took into consideration the interest of the *secured* claims to that date. . . ."

***Ticonic National Bank* v. *Sprague*, 303 U. S. 406.**

This is a landmark case dealing with *secured* interest.*

Whatever bearing these cases have on the amorphous concept of "emphasis" on "the respect to be accorded post-petition interest", Kern's counsel are guilty of the most

*Although the Kern Petition does not include *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, among the cases supporting this generalization, it states at an earlier place that the decision below "vitiates salient aspects" of the *Los Angeles Lumber* case. That case, like the others, dealt with a plan's provision for the secured claims of mortgage bonds as against common stock.

blatant sophistry when they conclude that these pre-*Saper* adjudications added up to the following (Kern Pet., p. 17):

> "In reorganization proceedings, there was no statutory bar to the accrual of interest after the filing of the petition; [*] interest was entitled to the same absolute priority as principal; . . ."

To reach these conclusions, obviously phrased to *seem* applicable to unsecured as well as secured interest, Kern has cited not a single case dealing with interest on *un*secured claims.**

Continuing his sophistry Kern proceeds (p. 17):

> "Neither *Saper*, nor its subsequent extension without opinion to tax claimants in corporate reorganizations (*United [States]* v. *Edens*, 342 U. S. 912) gives any intimation that the Court intended to impair any of the principles previously established."

The "principles previously established" by the cases which the Kern Petition cites were principles applicable to interest on secured, not unsecured, debt.*** We agree that

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*Perhaps this statement escapes outright falsity by the phrase "there was no statutory bar". The principle that interest on unsecured claims stops at the date of bankruptcy is, as this Court has stated, not a statutory one but a "fundamental principle" taken over into our bankruptcy practice at its inception from English bankruptcy law.

**Except for *In re Deep Rock Oil Corp.*, 113 F. 2d 266 (10th Cir. 1940); but see Point II, *infra*.

***As recognized by this Court in *Ticonic Nat'l Bank v. Sprague*, 303 U. S. 406, 411-412, the disparity between the rights of secured and unsecured creditors to post-bankruptcy interest arises from, and is rationally supported by, the fact that

> ". . . Secured creditors have two sources of payment for their claims—the liability of the debtor and the liability of the pledged or mortgaged assets. One is personal, the other in rem. The liability in personam of the [debtor] gives rise to a claim in rem against the free assets in the hands of the receiver; the claim in rem against the security continues as a claim in rem against that same security. With respect to the former the secured creditors have merely the same rights as any

neither *Saper* nor *Edens* intimates an intention to impair these principles. We go farther: they did not in fact impair them.

2. Petitioner's Historical Review Continued—Post-Saper

The necessary next step in Kern's argument is to show that *Saper* upset previous reorganization law. Under the heading "Confusion in Lower Courts Since *Saper*", (Kern Pet. p. 18) he proceeds* with a catalog of lower court decisions apparently intended to show the magnitude of the alleged "confusion".

Of these decisions, five deal with claims for taxes.** They clearly apply the rule against post-bankruptcy interest to tax claims (except *Marcalus*, which with equal clarity applies the "solvency" exception). They give effect to *Saper* within the narrow confines to which Petitioners them-

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general creditor, and in so far as dividends are paid to secured creditors from free assets, they share ratably with the unsecured creditors, and their claims bear interest to the same date, that of insolvency. . . . But to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution . . . and interest accruing after insolvency may not be withheld on account of that principle."

Clearly, these considerations are just as applicable in reorganization as in liquidation proceedings.

*After first reiterating his underlying sophistry (Kern Pet. p. 18):

"Despite this Court's clear refusal in the *Milwaukee* case (318 U. S. 523, 546) to accept the theory that the reorganization statutes do not permit the accrual of interest after the filing of the petition . . ."

As we have pointed out above, the *Milwaukee* case plainly and expressly related to interest on secured bonds.

**_State of New York_ v. _Feinberg_, 204 F. 2d 502 (2d Cir. 1953); _Sword Line_ v. _Industrial Commissioner of New York_, 212 F. 2d 865 (2d Cir. 1954); _National Foundry Co._ v. _Director of Internal Revenue_, 229 F. 2d 149 (2d Cir. 1956); _Marcalus Mfg. Co., Inc._ v. _United States_, CCH Bank. L. Rep. ¶ 59,403 (Ct. Cls. January 14, 1959); _Columbia Aircraft Company_ v. _United States_, 163 F. Supp. 932 (S. D. N. Y. 1958).

selves would limit it by their argument that it only applies to tax claims. They have no bearing on Kern's thesis that *Saper* has upset reorganization law generally. They show no confusion.

Two other of the cited cases apply (with no trace whatever of "confusion") the recognized exceptions to the rule that interest stops at the date of bankruptcy: *Eddy* v. *Prudence Bonds Corp.*, 165 F. 2d 157 (2d Cir. 1947), the secured claims exception;* and *In re F. P. Newport Corp.*, 123 F. Supp. 95; *appeal dismissed*, 216 F. 2d 344 (9th Cir. 1954), the solvency exception.**

In *Palo Alto Mutual Savings & Loan Association* v. *Williams*, 245 F. 2d 77 (9th Cir. 1957), Judge Denman concluded that in *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10 (9th Cir. 1951), he had misread this Court's *Vanston* opinion as not permitting the exception that *secured* creditors can recover post-bankruptcy interest from the proceeds of the sale of their security. But neither *Palo Alto* nor *Beecher* indicates the slightest doubt as to the rule applicable to *un*secured interest, namely, it stops at date of bankruptcy.*** Similarly, *In re Magnus Harmonica Corp.*, 262 F. 2d 515 (3rd Cir. 1959), dealt with application of the exception available to secured creditors, and indicated no doubt as to the rule as to unsecured creditors.****

**Held*, senior lienors should be paid post-bankruptcy interest prior to junior lienors if the income from or value of the collateral is sufficient to pay such interest.

***Held*, surplus proceeds from sale of bankrupt's estate should be applied to interest on unsecured debt, before being repaid to the bankrupt.

***Judge Denman expressly attributes his error to misinterpretation of *Vanston* v. *Green*, 329 U. S. 156 (1946) and in no wise to *Saper* or *Edens*.

****In *Magnus*, the court held in a complex situation, involving "factoring" charges, that where the factoring creditor's claim against the bankrupt (secured) included large amounts of pre-bankruptcy interest on interest, and large overcharges (no longer contestable) for prebankruptcy interest erroneously computed, the court, in exercise

This ends the Kern Petition's list of post-*Saper* "confusion" cases. We can only conclude that—certainly as to the rule applicable to interest on *un*secured claims—the only "confusion" exists in Petitioners'-minds.

II. THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND THE DEEP ROCK DECISION OF THE TENTH CIRCUIT.

The *Deep Rock** subordination of open account claims to the payment of postbankruptcy interest on unsecured notes, as well as to payment of their principal amounts, was expressly rested by the Tenth Circuit on the general principle that prior unsecured claims are entitled to such interest even if payment of it deprives holders of inferior claims of principal. That general principle clearly is untenable after *Saper* and *Edens*, particularly since the authorities relied on by the Tenth Circuit included cases involving interest on *tax* claims which were decided contrary to and prior to *Saper*.** Nor would the fact that the Courts of Appeals for the Sixth and the Tenth Circuits, upon different records, exercised to differing extents their equitable powers of subordination show a conflict between their decisions.

---

of its equity powers could refuse post-bankruptcy interest to the creditor. The court in *Magnus*, as the court below in this case, recognized the following principles of general applicability: (1) that interest does not run after the date of bankruptcy; (2) that there is an exception in favor of secured creditors; and (3) that a bankruptcy court has equitable powers to limit or disallow the claims of secured creditors, as the facts of the particular case require.

*In re Deep Rock Oil Corp., 113 F. 2d 266 (10th Cir. 1940), cert. denied, 311 U. S. 699 (1940).

**These were *Board of Commissioners* v. *Bernardin*, 74 F. 2d 809 (10th Cir. 1934) and *McFarland* v. *Hurley*, 286 Fed. 365 (5th Cir. 1923). All the other authorities relied on by the *Deep Rock* opinion were cases involving secured claims: *American & Steel Mfg. Co.* v. *Seaboard Airline Ry.*, 233 U. S. 261 (1914); *Central Trust Co.* v. *Condon*, 67 Fed. 84 (6th Cir. 1895); and *Spring Coal Co.* v. *Keech*, 239 Fed. 28 (4th Cir. 1916).

In Opposition to the Allen Petition

III. THE DECISIONS BELOW, IN REFUSING TO REJECT COLUMBIA'S CLAIMS, DO NOT PRESENT ANY IMPORTANT QUESTION OR CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Allen Petition argues that Columbia's claims should be rejected. They have urged this many times before. We enumerated these repeated prior efforts and the reasons why they had been, and should again be, denied, in our Brief in Opposition to the Allen petition for certiorari in 1957. Without burdening this Court with a repetition, they are, in sum, that: (i) the Court of Appeals, fully aware of its power to disallow Columbia's claims and of all the facts material to the question, repeatedly and unanimously has refused to do so, and (ii) there is lacking any basis for a conclusion that the refusal to repudiate its prior decisions constitutes an abuse of discretion which the powers of this Court should be exercised to correct.

In view of the express and frequent recognition by the Court of Appeals of its power to direct the disallowance of Columbia's claims, the Allen Petition's suggestion that the decisions below conflict with *Pepper* v. *Litton*, 308 U. S. 295, is plainly without merit.

CONCLUSION

The Petitions for Writs of Certiorari (Nos. 765, 766 and 774) should be denied.

Respectfully submitted,

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March 21, 1959.

FILED
MAR 19 1959
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 765.

Charles J. Gregory and Clyde L. Paul, as a Committee for Holders of Kentucky Fuel Gas Corporation 6½% Debentures and The Vanston Bondholders Protective Committee for Holders of First Mortgage Bonds of Kentucky Fuel Gas Corporation, Petitioners,

vs.

The Columbia Gas System, Inc., Ben Williamson, Jr., as Trustee of Inland Gas Corporation and of Kentucky Fuel Gas Corporation, et al., Respondents,

and

Paul E. Kern, Petitioner,

vs.

The Columbia Gas System, Inc., et al., Respondents,

and

In the Matter of Inland Gas Corporation, Debtor,

In the Matter of Kentucky Fuel Gas Corporation, Debtor,

In the Matter of American Fuel & Power Company et al., Debtors.

BRIEF

Of Clinton M. Harbison, Trustee in Opposition to the Petitions for Writs of Certiorari in the Above Captioned Cases.

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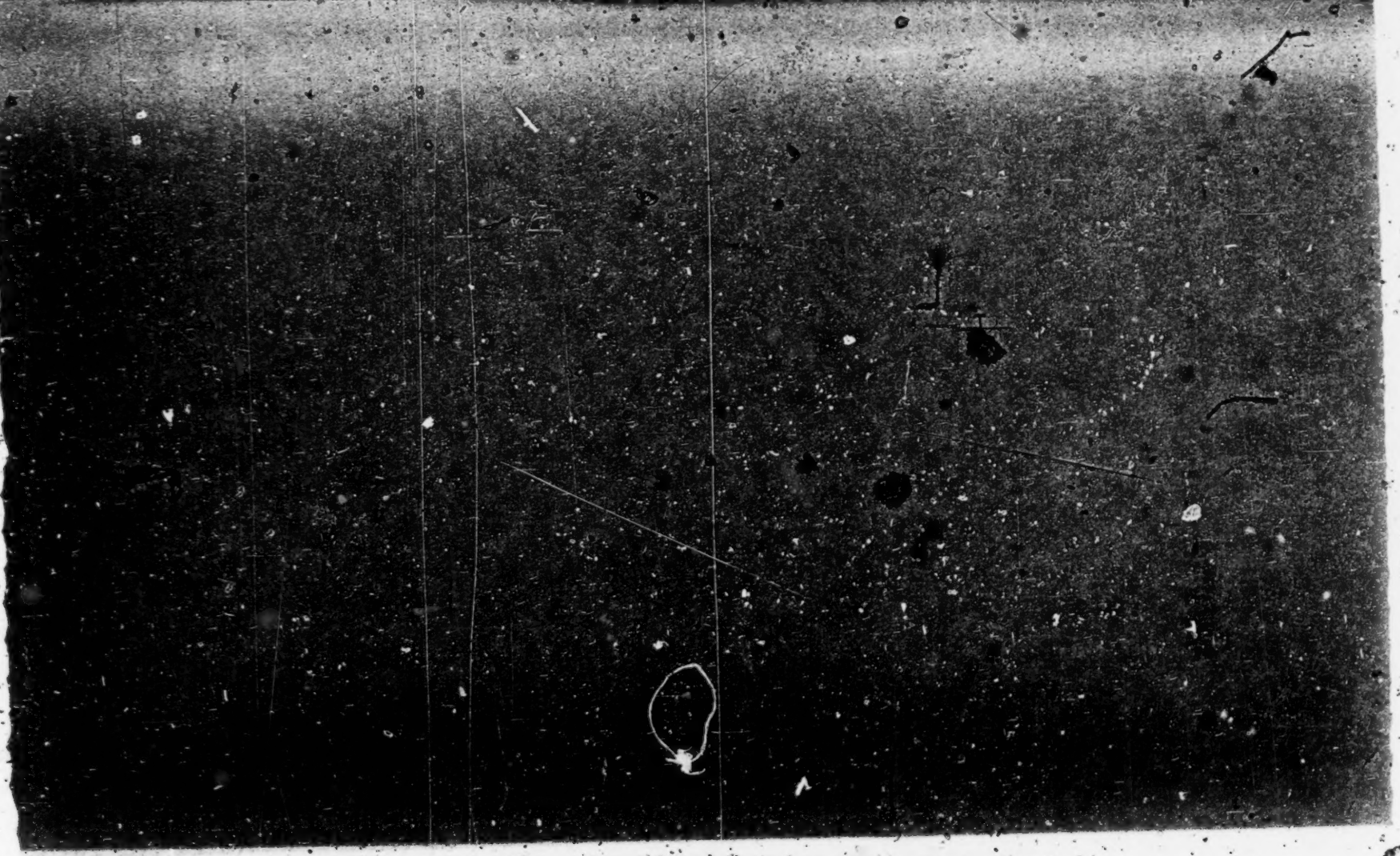

SUPREME COURT OF THE UNITED STATES.

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Charles J. Gregory and Clyde L. Paul, as a Committee for Holders of Kentucky Fuel Gas Corporation 6½% Debentures and The Vanston Bondholders Protective Committee for Holders of First Mortgage Bonds of Kentucky Fuel Gas Corporation, Petitioners,

vs.

The Columbia Gas System, Inc., Ben Williamson, Jr., as Trustee of Inland Gas Corporation and of Kentucky Fuel Gas Corporation, et al., Respondents,

and

Paul E. Kern, Petitioner,

vs.

The Columbia Gas System, Inc., et al., Respondents,

and

In the Matter of Inland Gas Corporation, Debtor,

In the Matter of Kentucky Fuel Gas Corporation, Debtor,

In the Matter of American Fuel & Power Company et al., Debtors.

BRIEF

Of Clinton M. Harbison, Trustee in Opposition to the Petitions for Writs of Certiorari in the Above Captioned Cases.

STATEMENT OF THE CASE.

We are unable to agree with the statement of the case contained in the petitions filed by the Committee for Holders of Kentucky Fuel Gas Corporation debentures and of the Vanston Committee, nor do we agree with the statement contained in the petition filed by Paul E. Kern insofar as these petitions advance as a reason for granting the writ applied for, that the plan of reorganization allows post bankruptcy interest to the Holders of American Fuel

and Power Company Gold Notes. This response will be limited solely to a consideration of this phase of the case, as we anticipate that counsel for Columbia Gas System will respond to the issues made between the petitioners and the Columbia Gas System as respondent. We think when the facts of the case are correctly understood it will be readily apparent that the District Court committed no error of law in approving the plan of reorganization which allowed interest on the American Fuel publicly held securities.

The issue of the American Fuel and Power Company 6% Gold Notes was secured by a pledge of 72.6% of stock of Inland Gas Corporation. The factual basis for the petitioners contention that the claims of the Kentucky security holders and the American Fuel security holders should be treated on a pari passu basis is that Inland Gas Corporation is insolvent and that therefore the security behind the Inland Gas notes is worthless and has no value. They further contend that both claims were awarded quasi-creditor status and therefore should be treated alike. These assertions of fact, if incorrect, cause the respondents legal arguments to fall of their own weight. This is candidly admitted in the petition of the Committees for Kentucky Fuel security holders at page 17 where it stated: "Admittedly, if the 73% of the Inland stock has value, then all of such value inures to the benefit of the American Noteholders' claims." We propose to demonstrate that the pledge of the stock has a value insofar as the American Fuel securities are concerned in excess of the face of their claim plus accrued interest.

The beginning point, as we see it, is the decision in re Inland Gas Corporation, 187 F. 2d 813. This case involved a contest between Columbia Gas System on the one hand, and the holders of Kentucky securities and the American Fuel notes. The primary question for decision was whether or not Columbia was entitled to a share of the

reorganized Inland, prior to the payment of the claims of the American and Kentucky security holders. It was urged in brief in that case that, since the stock of Inland was pledged as security for the American notes and for the Kentucky securities, the inequitable conduct of Columbia had impaired the value of the security behind the American and Kentucky issues, and therefore it would be inequitable to permit the wrongdoer to share in the reorganized Inland until after further recognition had been given to the equities in favor of the American and Kentucky securities.

That the basis of the decision was the injury done to the security behind the American and Kentucky obligations is clearly indicated by the following quotation from the opinion:

> "(2, 3) We are not advised by this record of the circumstances under which or the representations by which the gold notes of American Fuel supported by the pledge of Inland stock, were sold, and the trust indenture under the terms of which they were issued is not here. The inference is inescapable, however, that the main reliance of the public investors in such securities must have been the Inland stock, based upon Inland assets and pledged for their benefit by American and Kentucky. We are aware that some of the appellants contend that at that time Inland stock had little or no value. The fact remains, however, that the investors must have relied, to large extent, upon the assets of Inland. If not, why was Inland stock pledged? The purpose of the issue was to rehabilitate Inland, to save it from debt default and to increase its holdings of gas acreage, and the inference is likewise inescapable that this must have been understood by the investors. Moreover, it now appears that through excellent management by its trustee Inland assets are sufficient to pay all of its debts exclusive of

the claim of Columbia, so that the expectation of its rehabilitation was not wholly vain. Besides, the entire reorganization structure now planned rests upon the assets of Inland. So viewing it, we think that the public security holders whose investments were guaranteed and supported by a pledge of Inland stock are, in a very true sense, creditors or quasi-creditors of Inland, and that whatever the formal arrangement may have been a realistic view is that they are entitled to creditor status in the plan of reorganization."

We have carefully examined all of the briefs that were filed in that appeal and all of them, without exception, are based upon the factual assertion, since proved false, that 26% of the Inland stock was pledged to secure the Kentucky issue. The opinion further contains the assumption that Inland stock was pledged for the benefit of the Kentucky security holders. This is an important consideration in view of the contention now made by the Kentucky interests that they are entitled to pari passu treatment. The simple fact is that, as the record now states, it has been developed that the Kentucky securities are not secured by a pledge of the Inland stock, while the American securities are, thus, necessitating a different result as between the two estates so far as the two classes of securities are concerned.

The security behind the American Fuel gold notes, namely, the Inland equity, has value. It is a simple Accounting principle that assets equal liabilities plus net worth. Applying this simple formula to the instant situation, the assets of Inland equal its obligations plus the equity after its obligations are paid. As shown by the record, the assets of Inland, after deducting estimated reorganization fees, are approximately $9,900,000. Its debts approximate $900,000, excluding the claims of Columbia, leaving $8,900,000. The claims of Columbia aggre-

gate in principal amount approximately $2,000,000. This constitutes all of the real debt of Inland.

The balance of Inland's assets constitute the equity which is represented by its shares of stock. Seventy-two percent of this equity was pledged to secure the American Fuel gold notes. In the opinion in 187 F. 2d 813 the Court necessarily held, however, that Columbia's debt should be subordinated and not considered in determining the amount of equity available as the security for the American notes.

Seventy-two percent of the $8,900,000 remaining after the satisfaction of the direct claims against Inland, disregarding the claims of Columbia, is necessarily by any computation in excess of the principal and all past due interest on the American Fuel gold notes. The direction of this Court in the 187 F. 2d 813 case to assign to the American notes 72.6% of the residue of the Inland assets over its debts to the American securities, simply was a recognition of the fact that the pledge of 72% of the Inland equity was a valid pledge and that the pledge had value to that extent.

All that has ever been meant by the statement that Inland was insolvent was that there was nothing left for the stockholders of the system as such, after the payment of American securities, Kentucky securities and the subordinated claims of Columbia. The simple statement that Inland was, or is, insolvent in the sense in which it has been used, by no stretch of the imagination, can be tortured into a meaning that the Courts below have ever held that the pledge of the Inland equity to secure the American notes is without value.

The above analysis of the facts of this matter is sufficient to show that the American Fuel securities were secured by a pledge having value in excess of the debt with interest. We understand that it is admitted by all parties

that a secured creditor is entitled to the value of his security and to apply the security to the payment of interest as well as debt. In other words, as we see this matter the issue really is a factual one and certainly does not require the exercise of jurisdiction by this Court.

Respectfully submitted,

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FILED
MAR 20 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 765

CHARLES J. GREGORY, *et al.*,

Petitioners,

—v.—

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 766

PAUL E. KERN,

Petitioner,

—v.—

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

No. 774

ELMO E. ALLEN, *et al.*,

Petitioners,

—v.—

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO PETITIONS FOR CERTIORARI

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Definitions

AMERICAN	American Fuel & Power Company
AMERICAN NOTEHOLDERS	Holders of American publicly held 7% secured debtor notes.
AMERICAN TRUSTEE	William M. Hamilton, Trustee of American Fuel & Power Company.
CHAPTER X	Chapter X of the Bankruptcy Act, 11 U.S.C. §§501 et seq.
COLUMBIA	The Columbia Gas System, Inc., heretofore known as Columbia Gas & Electric Corporation.
DISTRICT COURT	U. S. District Court for the Eastern District of Kentucky.
INLAND	Inland Gas Corporation
INLAND TRUSTEE	Ben A. Williamson, Jr., Trustee of Inland Gas Corporation.
KENTUCKY	Kentucky Fuel & Gas Corporation, debtor.
KENTUCKY BONDS	The Kentucky first mortgage bonds held by the public (other than Columbia).
KENTUCKY CREDITORS	Creditors* of Kentucky (other than Columbia).
KENTUCKY DEBENTURES	The Kentucky Debentures held by the public (other than Columbia).
PLAN OF REORGANIZATION OR PLAN	The Plan dated February 25, 1958, as amended, confirmed by the orders of the Court below.
POST-BANKRUPTCY INTEREST	Interest accruing after appointment of Equity Receiver on December 2, 1930.
S. E. C.	United States Securities & Exchange Commission.
THE COURTS BELOW	The District Court and the U. S. Court of Appeals for the Sixth Circuit.

*These creditors include the holders of Kentucky's first mortgage bonds as well as Kentucky's debenture bonds.

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—v.—

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO PETITIONS FOR CERTIORARI

Preliminary Counter-Statement

The petitions seek review of issues which by a previous determination and opinion of the Court below were adjudicated adversely to the petitioners in an earlier series of appeals after full briefing and argument which included support by the Securities and Exchange Commission (*In Re: Inland Gas Corporation*, 241 Fed. 2d, 374; cert. denied,

355 U. S. 838—October 14th, 1957; 355 U. S. 879—November 18, 1957, rehearing denied).

Upon the claim and theory that the denial of certiorari by this Court was based upon the non-final nature of the order and decree there appealed from, petitioners now seek review of the latest decree and mandate of the Court below, (6th Cir., *In Re Inland Gas Corporation, et al., debtors,* January 15, 1959—262 Fed. 2d, 510), which in a per curiam opinion joined in by Chief Judge Simons, (he had dissented in the prior appeals on one issue in *Inland Gas Corporation,* 241 Fed. 2d 374 denying Kentucky's public creditors post-bankruptcy interest) dismissed the appeals taken by petitioners and directed affirmance of the judgment of the District Court confirming the plan now here. This court has granted certiorari in bankruptcy cases where the order entered was interlocutory—in fact in these very proceedings. (See, *Vanston* v. *Green,* 329 U. S. 156 [1946].)

The Plan now here was approved and confirmed in accordance with the mandate from the Appellate Court in *Inland Gas Corporation,* 241 Fed. 2d 374—cert denied and rehearing denied 355 U. S. 838, 879.

These proceedings have been pending in the District Court as to Inland and Kentucky since December, 1930, through equity receiverships, 77B petitions and the present Chapter X Bankruptcy reorganization proceedings, (1949 Record Vol. 1, pp 1, 14, 29, 38, 116, 120, 126, 130); and as to American by equity receivership in a State Court since 1934 through 77B Bankruptcy reorganization in the Delaware District Court and thereafter since March, 1940 in the District Court. (*In Re: American* 32 Fed *Sup.* 107, D. Del.

1940). Since 1940, the proceedings as to all of these debtors, have been conducted before the same District Judge in Eastern Kentucky where the affairs of Inland and Kentucky were under his judicial supervision since 1935.

This respondent opposes the petitions for certiorari filed by the Vanston Committee for Kentucky bonds; by the Kentucky debenture bondholders Committee and by one, Paul E. Kern, who, a member of the New York Bar from 1941, to in or about 1954 acquired 34% of the publicly held Kentucky bonds. (*In Re: Inland*, 241 Fed. 2d, 364, 374, 376.)*

The grounds upon which opposition to the granting of certiorari are based, justifying the denial or dismissal of the petitions are briefly as follows:

1. No important or substantial federal question is presented.

2. The issues have already twice been passed upon below in *In Re Inland*, 241 Fed. (2d) 374 and in *In Re Inland*, 262 Fed. (2d) 510. Furthermore this Court denied certiorari in respect of *Re Inland*, 241 Fed. (2d) *supra*, and also denied a petition for rehearing.**

3. There is no conflict between the Circuit Courts of Appeals since, in approving and confirming the Plan, the exercise of equity power was inherent.

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* Petitioners Vanston Committee and Kentucky Debenture Bondholders Committee supported the effort to compromise with Columbia, opposed by this respondent, and resulting in the beginning of proceedings in which finally Columbia's claims were subordinated. (See *In Re: American*, 122 Fed. 2d 223, 6th Cir. 1941; *Re: Columbia v. United States*, 6th Cir. 151 Fed. 2d 461, Cert. denied, 329 U. S. 737.

** Certiorari denied 355 U. S. 838—October 14, 1957; rehearing denied 355 U. S. 879—November 18, 1957.

4. The Kentucky public creditors are receiving all to which they are entitled either by virtue of the subordination and the extent thereof decreed below, or by virtue of the Kentucky estate's ownership of 26% of Inland stock, whose value under the Plan amounts to approximately $2,200,000.00* and the plan provides Kentucky's public creditors with the sum of $2,466,316.50. (The Plan—Exhibit "F")

Although this respondent, through its present counsel, bore laboring oar on the Anti-Trust issues resulting in the subordination of the Columbia's claims against these debtors, we support the Plan which provides payment to Kentucky's public creditors of principal with defaulted interest to December 2, 1930, the date of the equity receivership and further provides for Columbia approximately $3,000,000.00 of the outstanding stock of the reorganized company. We do so because we believe twenty-eight years of judicial administration require the termination of these

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* Reorganization Valuation (Dec. 31, 1957, Exhibit "F"—the Plan) $10,538,800.00

For American's Subsidiaries (Exhibit "F" —The Plan)	$300,000.00
Reorganization Expenses (estimated—Exhibits "E", "F" and "G"—The Plan)	835,000.00
Direct claims against Inland (The Plan—Exhibit "A")	963,359.89
Balance for Inland Stock—73.6% as security for American's noteholders & 26.4% to the Kentucky Estate	8,355,440.11
Total	$10,538,800.00
Resulting in American's collateral of 73.6% being worth approximately	$6,149,280.00
and Kentucky estate's 26.4% of Inland Stock	2,205,720.00
	$8,355,000.00

proceedings and the closing of these cases by consummation of the plan unless demonstrated manifest unfairness or injustice exists. We do not believe, and therefore submit, that neither injustice nor unfairness is shown by the petitions. These petitions do not reflect the fact that the Courts below exercised discretionary power in approving and confirming the Plan, a condition precedent to which, of necessity, was that the Plan in the exercise of that discretion was equitable. Furthermore, Columbia's claims were never rejected and therefore exist in full vitality, subject only to such subordination as the District Judge sitting in equity, as he does, determines to be just and fair. We perceive no injustice or unfairness, manifest or otherwise, where, as here, the subordinated secured creditor in the person of Columbia has remained subordinated for over fifteen years while more than $10,000,000,00* of claims and other sums were distributed out of the assets of the estates of these debtors.

Despite twenty-eight years of judicial administration, for the first time in the history of these proceedings, the plan now before this Court is a confirmed plan awaiting consummation. The respondent believes and submits that the petitions should be dismissed since they present no important or substantial Federal question and upon facts, the history of these proceedings and the adjudications already had, we are properly urging finality by the consummation of the plan where, as here no manifest unfairness or injustice may be perceived. We submit that the American public noteholders are entitled to have their claims finally paid in full with interest out of the value of assets which are theirs, either directly, or by resort to the collateral. For that purpose, every plan of reorganization

* Transcript District Court May 9, 1958, pp. 143 and 144

which has been the subject of appeals since in or about October, 1949, having reflected provision of payment to them of their claims in full with such interest as value from time to time justify.*

Thereafter and until March 6th, 1956, petitioners from time to time sought decrees from the District Judge directing the trustee to borrow funds to liquidate the indebtedness including interest to American's public noteholders. (See, *Kern's plans*, May, 1955, July, 1955, and Kern's petition, March 6th, 1956.)

Counter-Statement of Facts

The Plan:

It deals with all property and claims of the debtors. Each of the debtors is insolvent** and the plan is based upon reorganization value for the properties of the debtors as of December 31st, 1957, of $10,538,000.00. (See the Plan, Exhibits "A"-"C", respectively). The Inland trustee is to acquire all assets of American, American subsidiaries, and Kentucky, except for cash and cash items, subject to current liabilities, in the ordinary course of business. The Inland

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* Since *In Re: Inland Gas Corporation*, 187 Fed. 2d 813, 6th Cir., dealing with the plan of October 1st, 1949, American's noteholders have been held entitled to look to the value of 72.6% of Inland stock securing their notes for payment of their claims including interest.

** Petitioners rely upon the adjudication of insolvency for the claim that the Inland stock to the extent of 72.6% thereof must be worthless. This claim was made as far back as 1948 and resolved against them in 187 Fed. 2d 813, 6th Cir., 1951, and was sustained in the later opinion below in 211 Fed. 2d 381, Cert. denied, 368 U. S. 840 (1954); 217 Fed. 2d, 6th Cir., 1954; and 241 Fed. 2d 374, 6th Cir., Cert. denied 355 U. S. 838 (1957).

trustee, after borrowing $4,000,000.00, or a lesser sum necessary to consummate the plan, will use the loan proceeds and all cash balances available to the trustees to pay in full in cash all claims, except those of Columbia, consisting of priority and direct claims against Inland; claims of the publicly held American notes with interest to the date of payment and claims of Kentucky bonds and debentures publicly held with interest to December 2nd, 1930, when the District Court took control and judicial supervision by the appointment of equity receivers. (Exhibit "D" to the Plan, Article 6 and 8 of the Plan.) All of the claims held by Columbia against the debtors are given recognition after the payment of all other claims, by Columbia receiving all of the common stock of a reorganized company subject to the sum borrowed up to but not exceeding $4,000,000.00; and the net worth of the reorganized company's stock, predicated upon valuation, amounts to approximately $3,060,000.00. Pending Columbia's obtaining an appropriate S. E. C. order under the Public Utility Holding Act of 1935, the stock of the reorganized company is to be held by an escrow agent appointed by the District Court.*

The respondent will deal with the only two issues that concern the American publicly held notes as reasons alleged by petitioners for the granting of the writ sought. The first issue dealt with by all three petitioners, though stated in different language, is the alleged importance, presumably as a Federal question, of the denial of post-bankruptcy interest to a non-subordinated unsecured claim as against

* Columbia being a registered holding company is required to obtain permission to acquire the common stock of the reorganized company. (See 15 U. S. C. A., Sec. 79—1952.)

a subordinated mortgage claim; and the second issue raised, not by petitioner, Kern, but by petitioners Gregory, *et ano* and Vanston that Kentucky's public creditors are entitled to equal treatment with American's noteholders and if post-bankruptcy interest is denied, Kentucky creditors, it should similarly be denied to American's noteholders.

Petitioners again attack for the third or fourth time (initially in the hearings below resulting in *In Re Inland Gas Corporation*, 187 Fed. (2d) 813; again in the hearings resulting in *In Re Inland Gas Corporation* 211 Fed. (2d) 381, cert. denied (1954) 348 U. S. 840, and in *In Re Inland Gas Corporation*, 241 Fed. (2d) 374, cert. denied (1957) 355 U. S. 838, rehearing denied 355 U. S. 879, that Inland having been found insolvent, the stock owned by American and pledged to secure American's notes to the extent of 73.6% is worthless. Being worthless its security is non-existent and hence American public noteholder's claims are of the same quality and rank as those of Kentucky's public creditors. Kentucky's creditors overlook completely the fact that American's noteholders have been held to be secured creditors of Inland taking the position that Columbia, with its secured direct claims against Inland, would otherwise have enjoyed. Petitioners furthermore are completely oblivious to their own position as a creditor of Inland if the stock were worthless. If Inland stock were worthless and it has been held otherwise in three previous attacks below, what relationship would the Kentucky estate have or what could its interest in Inland's assets be? Were Inland's stock worthless, Kentucky's estate would have no claim whatsoever against Inland. It is clear that the insolvency of Inland does not establish the worthlessness of the Inland stock securing American's notes. It is rather

that such stock was given value by Columbia's claims being subordinated.

We state at the outset that the Securities and Exchange Commission supports the right of the American noteholders to payment of the principal of their claim with interest to the date of payment.*

Petitioners must apparently be reminded that Kentucky's bonds and debentures never were factually legally or equitably in a *pari passu* position with American's noteholders. The public purchased the Kentucky bonds and debentures in June, 1928. Only after that purchase did Kentucky acquire 26% of Inland common stock for $392,919.80.**

---

* S. E. C. Brief, October, 1958, filed below at pages 24, 28, where at pages 24 and 25 of that Brief:

> "C. Payment of interest on the claims of public creditors of Kentucky should not be increased at the expense of the public creditors of American Fuel.
>
> We disagree with the contention made on behalf of Kentucky's public creditors that if they are not entitled to post-bankruptcy interest, neither are the public creditors of American Fuel (Kern Br. pp. 24-30; Paul Br. pp. 19-24; Vanston Br. p. 21). We note initially that this Court has held that a plan which accorded interest in full to American's public creditors was fair, since such interest was provided by the plan that was held fair and equitable by this Court in In re Inland Gas Corp., 211 F. 2d 381 (1954).
>
> Unlike the claims of the public creditors of Kentucky, the American Fuel gold notes are secured, and this Court's latest decision recognizes that secured claims may fall within an exception to the rule against post-bankruptcy interest."

** Kentucky's creditors asserted a claim for this amount against Inland, claiming fraud (Trans. Sept. 8 to 10, 1948, pp. 469-71, 578-82), which claim was rejected in findings of October 1st, 1949, all of which findings were affirmed on five appeals—*In Re Inland*, 187 Fed. 2d 813, 6th Cir. (1951). These shares of stock were by mis-

American's notes were publicly marketed in July, 1929 more than one year after the sale of Kentucky bonds and debentures and at the time of the public sale of American's notes, 72.6% of Inland's stock became collateral to the American notes.

We regret the necessity of reminding petitioners again that the proceeds of the sale of American's notes were needed and used for advances, with the proceeds of the sale of additional American stock and loans, aggregating over $2,300,000.00 to aid Inland and Kentucky, both of which were in financial distress caused by operating losses and burdensome obligations (Third advisory report, S. E. C. pp. 3, 4 and 5).

Petitioners also seem to overlook the fact that the District Court and the Court below in affirming the orders approving the Plan and confirming the Plan acted as Chancery Courts by the necessary finding that the plan, the first and only one in twenty-eight years of Court supervision that has been confirmed, was not alone fair and feasible but as well was equitable under all of the facts known as found by the Courts below in the long and tortuous history of these proceedings. It cannot be said that the Courts below were unmindful of the equities in this situation, in light of the many opinions in the Courts below.

We believe it appropriate to point out that American advanced $400,000.00 to Inland; thereafter $383,631.62; assumed a burdensome contract which was the obligation of

---

conception regarded as security for Kentucky's bonds until December 15th, 1955, when the District Court decreed that such stock was not security for Kentucky's bonds, but was merely an asset of the Kentucky estate.

Kentucky* and at present still has an unpaid claim against Kentucky which, with interest to December 31st, 1957, amounts to $170,142.89. (The Plan, Exhibit "B", under Liabilities Prior to Receivership.)

American notes were secured by 72.6% of Inland's stock under the terms of the original sale to the public of those notes (*In Re Inland Gas Corporation*, 187 Fed. 2d 813, at p. 817; *In Re Inland Gas Corporation*, 211 Fed. 2d 381, pp. 382, 383). The value of the American noteholders security, to wit —72.6% of Inland's stock is in excess of $6,000,000.00,. (Exhibits "A", "C", "E" and "F"—the Plan, after deducting from valuation reorganization expenses and direct Inland's debts with interest), Kentucky estate's 26% of Inland's stock has a value approximating the sum directed to be distributed to Kentucky's public creditors. (See Exhibits "A", "C", "E", and "F" —the Plan, after deducting from valuation reorganization expenses and direct Inland's debts with interest.)

We deem it unnecessary further to belabor the counter-statement of facts, except to add:

1. That American's public noteholders were accorded a secured creditor status in Inland by the subordination of Columbia's claims against Inland, whereas Kentucky's public bonds and debentures were denied secured status by the order of the District Court of December 15, 1955, from which no appeal was taken.

---

*Carbreath Gas Corporation, wholly owned and financed by American, assumed the obligation of Kentucky which received, directly, repayment of $583,149.48 from American's funds and the balance was paid directly by Carbreath to United Carbon Company, for the properties in question—See Transcript, Deposition of Gray, August 3, 4, and 5, 1948 at pages 106 to 112, with blueprint Exhibit following.

2. That as late as October 1st, 1956, Kern filed a petition in the District Court requesting payment of American's notes, after the District Court from the Bench on March 9th, 1956, when denying post-bankruptcy interest to Kentucky's public creditors specifically stated that that ruling did not apply to American public creditors because they were secured creditors. (Trans. March 8th, 1956, page 131, which was called to the attention of the 6th Circuit in the 1957 appeals by the Briefs of the S. E. C. and Kern and the debenture committees' petitions for rehearing.)

3. The other issues including the petition of Allen *et al.* for American Stockholders as affecting Columbia's rights, we believe, should be argued by its counsel and therefore do not comment thereon.

POINT I

The petitions should be dismissed since they do not present a substantial or important federal question.

The Petitioners urged that because subordination was decreed on the basis of violation of the Anti-Trust laws by Columbia, questions of great importance in the administration of the bankruptcy laws are raised and the denial of post-bankruptcy interest to a non-subordinated unsecured claim is contrary to well-recognized rules of law. The Court below, in *In Re Inland Gas Corporation*, 241 Fed. 2d 374, by majority decision to be sure, affirmed the District Court in the rejection of the plan of reorganization then before it upon the ground, among others, that provision for Kentucky's public creditors of post-bankruptcy interest was improper. Both the District Court and the

Sixth Circuit in 241 Fed. 2d, *supra*, were quite aware that they were dealing with a subordination question. They had been dealing with that question in many opinions since 1945, when the Sixth Circuit in *Columbia Gas & Electric Company* v. *United States*, 151 Fed. 2d 461, dealt with the subordination issue. The opinion in 241 Fed. 2d 374 at page 382, states:

> "The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.
>
> Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 and Pepper v. Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F. 2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do."

The Court below then carefully distinguished the *Deep Rock* case (113 Fed. 2d 266, cert. denied, 1940—311 U. S. 699) and the *City of New York* v. *Saper* case in (336 U. S.

388—1949 at pages 382 and 383). The petitions to review the decision of the 6th Circuit in 241 Fed. 2d 374 were denied by this Court in 355 U. S. 838 (1957). The petitioners on hearings before the District Court in respect to the Plan now here urged, among others, that the denial of certiorari in respect of *In Re Inland Gas Corporation*, 241 Fed. 2d 374 was undoubtedly based upon the lack of finality of the order then before the Courts below. As we have previously pointed out, the lack of finality of an interlocutory decree in bankruptcy does not preclude nor does the Court preclude itself from granting certiorari. It did so in these very proceedings in *Vanston* v. *Green*, 329 U. S. 156 (1946), when there was presented the right of a public creditor to interest upon past due interest.

From orders of the District Court dated May 13th, 1958 and June 2nd, 1958, respectively, approving as fair, feasible and equitable, and confirming the plan, the appeals below were taken.* Motions to dismiss the appeals were made by the American trustee and joined in by this respondent and Columbia. After briefs were filed on these motions to dismiss by both appellants and appellees, and after the submission and filing of all briefs on the merits by all of the parties to these appeals, the Court below heard full argument and had an opportunity to read all of the briefs in support and opposition, not alone to the dismissal of the appeals, but as well to consider the briefs on the merits, for, as the *per curiam* opinion indicates:

> "This Appellate Court has heard all arguments of four attorneys in favor of the motions to dismiss and those of five attorneys opposing the dismissals."

---

* This included the opposition of the Securities and Exchange Commission.

The Appellate Court considered some twenty briefs filed by the attorneys for and against the motions—which briefs included the briefs on the merits (262 Fed. 2d 510, 511).

Despite the fact that Judge Simons had disagreed with the majority in 241 Fed. 2d 374, he now joined his brothers in the *per curiam* opinion of which review is here sought; and after making reference to the full history of this long drawn-out litigation as disclosed by the numerous opinions of that Court,* the Court below, now unanimous, has this to say:

> "Upon the last remand to the United States District Court, District Judge Ford had a full hearing with all interested parties appearing by counsel to consider whether a proposed plan, presented by the trustees of the several debtor corporations involved, is fair, equitable and feasible. Upon conclusion of the hearing, the district court entered an order finding the plan fair, equitable and feasible.
>
> "On June 2, 1958, the United States District Court entered an order confirming the plan of reorganization and overruling all objections to the plan and to

---

* *In re American Fuel & Power Company*, 122 F. (2d) 223 (C. A. 6); *Columbia Gas & Electric Corporation v. United States*, 154 F. (2d) 461 (C. A. 6); *In re American Fuel & Power Company, et al.*, 151 F. (2d) 470, affirmed by the Supreme Court, *sub nom Vanston Committee v. Green*, 329 U. S. 156; *Columbia Gas & Electric Corporation v. United States, et al.*, 153 F. (2d) 401 (C. A. 6); *In re Inland Gas Corporation, et al.*, 187 F. (2d) 813 (C. A. 6); *In re Inland Gas Corporation, et al.*, 208 F. (2d) 13 (C. A. 6); *In re Inland Gas Corporation; Harbison v. Williamson, et al.; Vanston v. Williamson, et al.; Kern v. Williamson, et al.; Green, et al. v. Vanston, et al.*, 211 F. (2d) 381 (C. A. 6), certiorari denied, *sub nom Kern v. Vanston*, 348 U. S. 840; *In re Inland Gas Corporation, et al.*, 217 F. (2d) 207 (C. A. 6); *In re Inland Gas Corporation, et al.*, 241 F. (2d) 274 (C. A. 6), certiorari denied 355 U. S. 838 (1957).

its confirmation. It is obvious that the district judge attempted to the best of his ability and understanding—and we think successfully—to apply the principles stated in our last opinion (241 F. (2d) 374) and to put into full effect the mandate of this court. The evaluation which he put on the properties in issue was supported by substantial evidence and it cannot be said that his decision to follow the evaluation which he adopted upon expert testimony, rather than that of the Securities and Exchange Commission, was clearly erroneous. On the contrary, we find that the district judge exercised sound discretion in adopting the evaluation which he did, upon the basis of the expert evidence before him.

"We are of opinion, further that Judge Ford appropriately applied the adjudication of this court in 241 F. (2d) 374, with respect to post-bankruptcy interest and all other issues before him. Motions to dismiss are appropriate in the circumstances. Long Beach Dock & Terminal Co. v. Pacific Dock & Terminal Co., 98 F. (2d) 833, 835 (C. A. 9), certiorari denied 305 U. S. 1020; Securities and Exchange Commission v. Vacuum Can Co., 157 F. (2d) 530, 532 (C. A. 7), certiorari denied 330 U. S. 820.

"The appeals are dismissed; and the judgment of the district court confirming the plan of reorganization is affirmed."

POINT II

American public noteholders are secured creditors of Inland and having the right to look to the value of American's Assets and their security, are entitled to payment in full of their claims, with interest.

Contention is made by the petitioner, (in No. 765) Gregory *et al*, the Kentucky Debenture Bondholders Committee and obliquely by petitioner, Kern, in No. 766), that Inland being insolvent, its stock is worthless and hence the 72.6% of Inland stock as collateral to the American publicly held notes is worthless. Contention is further made that the claims of Kentucky's creditors and American noteholders are legally indistinguishable.

While the Kern petition at pages 21 to 23, does not go as far as that of the other petitioners in Nos. 765 & 766 (pp. 16 to 19), it attempts to use the argument as leverage to point up the importance and substance of the so-called Federal question. The reasoning is as specious as it is unsound. It was so found by the Court below in its latest opinion dismissing the appeals on the merits. (*In Re Inland Gas Corporation*, 262 Fed. 2d 510-11.)

Since the opinions below announced in *In Re: Inland Gas Corporation*, 187 Fed. 2d 813 (6th Cir. 1951) thereafter in the same title in 208 Fed. 2d 13 (1953), 211 Fed. 2d 381, cert. denied, 348 U. S. 840 (1954); 217 Fed. 2d 207 (1954), 241 Fed. 2d 374, cert. denied 355 U. S. 838 (1957) rehearing denied 355 U. S. 879 November 18, 1957) every plan has provided for the recognition of the secured nature of American Public noteholders claim against Inland assets to be measured by the value of 72.6% of Inland stock pledged to those notes. Effort throughout the long history

of these proceedings by Kentucky's creditors to invade the value of American noteholders' property has been denied them and yet do they persist in the same effort despite the many decisions over that long history.

The Gregory, *et al.* Kentucky Debenture Bondholders petition (No. 765) at Page 17, argues, as it did below, that, even if American noteholders' assertions as to the validity to the pledge of Inland stock are true, they cannot be considered as secured creditors of Inland by virtue of the definition of a secured creditor under Section 1 (28) of the Bankruptcy Act 11 U. S. C. Section 1 (28) limiting the definition to "a creditor who has security for his debt upon the property of the bankrupt." This too, is artless, for the petitioners completely ignore the fact as found, and the legal conclusion based thereon, that by virtue of the subordination of Columbia's claim, American's public noteholders moved into the position as a secured creditor of Inland measured by that Inland stock in the place of and the position which Columbia's claims might have enjoyed but for such subordination. The Kentucky estate may have a right to look to 26% of Inland stock to the extent of its value but no more, and no invasion of the property right serving as collateral to American's notes to the extent of 72.6% of Inland stock may be permitted to afford Kentucky creditors a bigger piece of the Inland pie.

Kern, in his petition (No. 766) at page 23 naively states that, when the case was before this Court previously under petition for writ denied (Inland Gas Corporation 355 U. S. 838 (1957), the Kentucky public creditors, "admitted" that the lower courts had merely remanded the case and their judgments were thus non-final. The Kentucky public creditors didn't "admit" but rather insisted that, un-

doubtedly the denial by this Court in 355 U. S., *supra* was, because of the non-final nature of the judgment then before it.

The petitioners urged that they had the right, under any plan or reorganization proposed which provided enough cash for the purpose, to have American public notes paid in full with interest and this took place as late as March 14th, 1956 and October 1st, 1956. (See Kern petitions bearing those dates.)

CONCLUSION

We submit and urge that upon the facts and the opinions below, through the long, tortious history of these cases no substantial or important Federal question is presented and that the petitions for certiorari should be promptly denied or dismissed as this Court deems appropriate. We believe that what this Court had to say in *Rice v. Sioux City Memorial Park Cemetery, Inc., et al.*, 349 U. S. 70 at page 74, is both apt and applicable to require the denial or dismissal most promptly of the petitions now here:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (Magnum Import Co. v. Coty, 262 U. S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 Sup. Ct. v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313.) 'Special and important rea-

sons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 341."

Dated: New York, N. Y.
March 17th, 1959

Respectfully submitted,

OSCAR S. ROSNER
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LE COPY

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FILED
MAR 21 1959
JAMES R. BROWNING, Clerk

Nos. 765, 766 and 774

IN THE

Supreme Court of the United States

October Term, 1958

No. 765
CHARLES J. GREGORY, and CLYDE L. PAUL, as a Committee for Holders of Kentucky Fuel Gas Corporation 6½% Debentures, and The Vanston Bondholders Protective Committee for Holders of First Mortgage Bonds of Kentucky Fuel Gas Corporation,
Petitioners,
v.
THE COLUMBIA GAS SYSTEM, INC., et al,
Respondents.

No. 766
PAUL E. KERN,
Petitioner,
v.
THE COLUMBIA GAS SYSTEM, INC., et al,
Respondents.

No. 774
ELMO E. ALLEN, et al,
Petitioners,
v.
THE COLUMBIA GAS SYSTEM, INC., et al,
Respondents.

On Petitions for Writ of Certiorari

CONSOLIDATED BRIEF OF BEN WILLIAMSON, JR., AS TRUSTEE OF INLAND GAS CORPORATION AND OF KENTUCKY FUEL GAS CORPORATION, IN OPPOSITION TO THE ABOVE STYLED PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 18, 1959

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DEFINITIONS

Inland Gas Corporation, Kentucky Fuel Gas Corporation, and American Fuel & Power Company are debtors in the three proceedings under Chapter X of the Bankruptcy Act pending in the District Court, and are hereinafter referred to respectively as "*Inland*", "*Kentucky*", and "*American*".

The Columbia Gas System, Inc., is hereinafter referred to as "*Columbia*".

Postbankruptcy interest means interest accruing after the institution of a receivership, bankruptcy, or reorganizaton proceeding.

IN THE

Supreme Court of the United States

October Term, 1958

No. 765
CHARLES J. GREGORY and CLYDE L. PAUL, as a Committee for Holders of Kentucky Fuel Gas Corporation 6½% Debentures, and The Vanston Bondholders Protective Committee for Holders of First Mortgage Bonds of Kentucky Fuel Gas Corporation,
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Respondents.

On Petitions for Writ of Certiorari

CONSOLIDATED BRIEF OF BEN WILLIAMSON, JR., AS TRUSTEE OF INLAND GAS CORPORATION AND OF KENTUCKY FUEL GAS CORPORATION, IN OPPOSITION TO THE ABOVE STYLED PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The District Court wrote no opinion. Its order dated June 2, 1958, appears in the Appendices to the Petitions (App. A, Pet. 765, p. 1a). The opinion of the Court of Appeals for the Sixth Circuit has not yet been reported, and appears in the Appendices to the Petitions (App. A, Pet. 765, pp. 4a-6a).

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petitions.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioners in Nos. 765 and 766 either own or represent bonds and debentures issued by Kentucky. Their statements of "Questions Presented" vary, and in some respects are redundant, and therefore we submit the following as the single question presented by their Petitions:

> Was it error or an abuse of discretion for the Court of Appeals to disallow postbankruptcy interest on the unsecured claims of the holders of the bonds and debentures of Kentucky?

We submit the following counter-statement of the question presented in No. 774:

> Was it error or an abuse of discretion for the Court of Appeals to confirm a plan of reorganization which rejects the claim or interest of the stockholders of American against Inland and denies such stockholders participation in the assets of American or Inland?

STATUTE INVOLVED

The pertinent provisions of the Bankruptcy Act (52 Stat. 840, 11 U.S.C. §1 *et seq.*) are set forth in the Petitions (App. B, Pet. 765, pp. 1b-2b).

STATEMENT OF THE CASE

Inland and Kentucky were incorporated in 1927 and 1928 respectively for the purpose of engaging in the business of producing, transporting and selling natural gas to industrial consumers. American was incorporated in 1928 for the primary purpose of acquiring the stock of Inland and Kentucky. American owns 72.6% of the stock of Inland and 91.12% of the stock of Kentucky. Shortly after their incorporation, Inland, Kentucky and American each had substantial issues of debt securities. Default was made on these securities in 1930, and these proceedings followed, first as equity receiverships, afterwards as proceedings under §77B of the Bankruptcy Act, and finally as a consolidated corporate reorganization proceeding under Chapter X of the Bankruptcy Act in the District Court for the Eastern District of Kentucky. The past history of the debtors is fully disclosed in the opinions of the Court of Appeals for the Sixth Circuit, referred to in the opinion of the court below.

Inland has been operated successfully by the Trustee, with the result that in excess of $10,000,000 has been distributed in full discharge of the claims of all of Inland's direct creditors, other than Columbia. The instant plan of reorganization values the remaining Inland estate at $10,538,800 as of December 31, 1957. As of the same date, Kentucky and American had current assets available for satisfaction of claims of $9,259.99 and $569,725.53, respectively.

The claims of the creditors of the debtors as of December 31, 1957, insofar as pertinent, were as follows:

Claimant	Principal	Accrued Interest	Total
Columbia's Claims against Inland	$2,143,468	$3,785,747	$5,929,215
Claims of Holders of Kentucky Bonds and Debentures, other than Columbia	2,778,600	4,759,971	7,538,571
Claims of American Noteholders, other than Columbia	1,905,100	2,933,854	4,838 954

Inland's bonds and debentures held by Columbia are secured by mortgages covering the assets and properties of Inland. The American notes are secured by a pledge of the Inland stock owned by American. The Kentucky bonds and debentures are not secured.

During the course of these proceedings, the claims of Columbia against the debtors were subordinated to "the claims of all other creditors of every class." Also, the American noteholders, other than Columbia and the holders of Kentucky bonds and debentures, other than Columbia, were adjudicated to be quasi creditors of Inland and thereby entitled to satisfy their claims out of the Inland estate. *Columbia Gas & Electric Corp. v. United States*, 151 F. 2d 461, 470, reh. and mod. den., 153 F. 2d 101; *In re Inland Gas Corp.*, 187 F. 2d 813; 211 F. 2d 381, cert. den. 348 U. S. 840.

Under a former plan of reorganization, interest had been provided for the holders of Kentucky bonds and debentures, other than Columbia, but, by an order of the District Court, such postbankruptcy interest was denied and the District Court refused to confirm the plan. The action of the District Court in this regard was affirmed by the Court of Appeals for the Sixth Circuit, Simon, J., dissenting, *In re Inland Gas Corp.*,

241 F. 2d 374, and the petitioners in Nos. 765 and 766 then filed petitions for writ of certiorari with this Court, but these petitions were denied, and, as well, a petition for a rehearing upon such denial was also denied. 355 U. S. 838, 879.

Upon remand, and at the direction of the District Court, and in response to the mandate of the Court of Appeals, the instant plan of reorganization was prepared by the Trustees, denying postbankruptcy interest to the holders of Kentucky bonds and debentures. The plan provides for full payment of postbankruptcy interest to the public holders of American notes which are secured by a pledge of the Inland stock owned by American. Based upon the valuation of the Inland estate which was approved by both the District Court and the Court of Appeals, the principal of Columbia's direct claims against Inland will be discharged in full and a substantial portion of the interest accruing on Columbia's secured claims against Inland will be satisfied, all by the issuance of stock in reorganized Inland.

The instant plan of reorganization was confirmed by order of the District Court entered June 2, 1958, and that order was affirmed by the decision of the Court of Appeals for the Sixth Circuit rendered on January 15, 1959, which petitioners now seek to review.

After more than twenty-eight years of operation [illegible]he debtors' properties by receivers and trustees, and [illegible]ter the legal issues arising from the claims of creditors have been submitted on seven different occasions to the Court of Appeals and on one occasion to this Court, the end of this protracted litigation is, at long last, now in sight if the petitions for writs of certiorari now pending are denied.

ARGUMENT

I. The decision below does not present any important questions of federal law.

The issue presented in Nos. 765 and 766 does not concern the broad question of the accrual and payment of postbankruptcy interest in a proceeding under the Bankruptcy Act, and particularly Chapter X of the Bankruptcy Act. This issue is uniquely narrow, because the question of postbankruptcy interest must be examined and determined within the context of the equitable subordination of the claims of Columbia, which has been previously adjudicated and is the law of the case. The technique and doctrine of equitable subordination in a corporate reorganization proceeding under Chapter X of the Bankruptcy Act is rarely utilized. Accordingly, any decision of this Court with regard to the scope of the rule denying the accrual and payment of postbankruptcy interest as applied to the unusual facts and circumstances of these proceedings would not have universal application.

Moreover, since the postbankruptcy interest question presented in these proceedings is inextricably linked with the doctrine or technique of equitable subordination, and since the application of the doctrine or technique of equitable subordination involves in turn difficult questions of fact, the District Court and the Court of Appeals, both of which are intimately familiar with these proceedings, are certainly in a position to speak with authority and finality.

Finally, the question of postbankruptcy interest has already been litigated and re-litigated. This question first arose by reason of the order of the District Court dated March 14, 1956, denying postbankruptcy

interest to the holders of Kentucky bonds and debentures. Petitioners in Nos. 765 and 766 appealed from this decision, and the order of the District Court, after full hearing, was affirmed by the Court of Appeals. *In re Inland Gas Corp.*, 241 F. 2d 374. Thereafter the petitioners filed in this Court petitions for writ of certiorari to review the judgment of the Court of Appeals. These petitions were denied by this Court, 355 U. S. 838, and thereafter, a petition for rehearing on the denial of the petitions for writ of certiorari was denied. 355 U. S. 379. After formulation of the instant plan of reorganization pursuant to the judgment and mandate of the Court of Appeals, the same postbankruptcy interest question was again presented to the District Court at the hearing on confirmation of the instant plan of reorganization. The District Court confirmed the plan, and again denied postbankruptcy interest to the petitioners. Thereafter petitioners again appealed to the Court of Appeals, raising the same question as to the disallowance of postbankruptcy interest. After this question had been again fully briefed by all parties, and after lengthy argument at a hearing upon a motion to dismiss the appeals, the Court of Appeals, on January 15, 1959, dismissed the appeals and affirmed the order of the District Court confirming the instant plan of reorganization. *In re Inland Gas Corp.*, ...F. 2d....., App. A, Pet. 765, p. 1a.

In view of the exhaustive litigation and relitigation of the postbankruptcy interest question, and in view of the action of this Court in previously denying petitions for writ of certiorari and a petition for rehearing upon the denial of the petitions for writ of certiorari, it is submitted that this question has already been decided with authoritative finality.